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Ochieng v Uganda

[1969] 1 EA 1 (CAK)

Division: Court of Appeal at Kampala

Date of judgment: 16 October 1968

Case Number: 41/1968 (134/68)

Before: Sir Clement de Lestang Ag P, Duffus Ag V-P and Spry JA

Sourced by: LawAfrica

Appeal from: High Court of Uganda – Phadke, Ag. J

[1] Constitutional Law – Fundamental rights – Personal liberty – Witnesses not to be detained by police while investigating a crime – Observations on proper procedure to be followed.

[2] Evidence – Confession – Confession made by accused – Accused detained for nine days by police and repeatedly interrogated – Whether admissible.

[3] Evidence – Confession – Corroboration – Necessity for – Confession corroborated by other evidence.

Editor's Summary

The appellant was convicted of murder on evidence which consisted principally of a confession made by him to the police after he had been kept in custody for nine days and repeatedly interrogated. It was suggested that the confession was not voluntary and should not have been admitted in evidence.

Held –

(i) there is no right to take a witness into custody pending an investigation into a crime;

(ii) although the necessary safeguards provided for by law had not been carried out following the arrest of the appellant this would not of itself prevent a voluntary confession being accepted as evidence against him, provided the judge had properly directed himself on the law and on the facts and had especially borne in mind the possible effect that the prolonged detention might have had on the mind of the appellant;

(iii) the learned judge having applied his mind to the relevant considerations, the Court was not prepared to say that he was wrong in admitting the confession (*Njuguna v. R* (1) distinguished);

(iv) the confession was corroborated.

Observations as to rights of personal liberty and the proper procedure to be followed by police which detaining persons pending investigation of crimes.

Appeal dismissed.

Cases referred to in judgment:

(1) *Njuguna s/o Kimani v. Regina* (1954), 21 E.A.C.A. 316.

Judgment

The following considered judgment of the Court was read on behalf of **Duffus Ag V-P:** The appellant and Manuel Okech were jointly charged and convicted for the murder of Emilio Scarfidi on March 1, 1967. The appellant was sentenced to death but his co-accused Manuel Okech was found to have been under the age of eighteen years on the date of the commission of the offence and was accordingly ordered to be detained in safe custody under the provisions of s. 297 of the Criminal Procedure Code. The co-accused Okech has not appealed.

The deceased, an Italian, was employed at the Universal Asbestos Company as a supervisor of the pipe plant. The appellant was employed in the same factory as a machine operator. It is the Republic's case that the appellant hired the first accused Manuel Okech to carry out the murder which occurred at the factory of Universal Asbestos Company at Tororo at about 8.30 p.m. on the night of March 1. The appellant was at that time along with other persons working on the night shift at the factory. The evidence established that the appellant telephoned the deceased to come to the factory as there was something wrong with the machinery. The prosecution alleged that this telephone call was a false report done as a part of the murder plot for the purpose of getting the deceased to the factory where the first accused was lying in wait to kill him. At any rate the deceased did come to the factory apparently as a result of this telephone call. There is a dispute as to whether the deceased did any work on the machine but it is agreed that after a few minutes in the machine room he left and then shortly afterwards returned to this room holding his neck and crying and bleeding from a cut wound on the left side of the neck and chin; he fell down and died on the spot. The wound, which was caused by a sharp cutting instrument, severed the muscles of the left side of his neck and damaged his left carotid artery. Death was due to bleeding from this artery. There can be no doubt that this injury was deliberately inflicted and that the deceased was murdered inside the factory compound. There was a trail of blood leading from his body in the machine room through the fibre store to the main sliding door to the yard where apparently the attack took place.

There were no eye witnesses, and the Republic's case against both the appellant and the first accused depended largely on their individual confessions along with other circumstantial evidence implicating both accused persons in the murder.

The first accused has not appealed but it is necessary in this appeal to consider all the evidence at the trial including that against the first accused. The first accused is alleged to have made three different confessions. The first of these confessions was alleged to have been made to John Othieno on March 6, 1967. The second confession was made to Inspector of Police Obran on March 10, 1967, when he had gone to investigate the report that had resulted from the alleged confession to John Othieno. The Inspector recorded the first accused's statement in his note book and the learned trial judge admitted this in evidence. The third statement was to Lazarus Opoya, now a merchant but at the time of the investigation a Sergeant of Police stationed at Tororo. This statement was taken in Dhopodhola language the language of the first accused. This statement was admitted in evidence after a trial within a trial had been held.

In his statements the first accused admitted that he struck the fatal blow but stated that this was done at the behest of and with the assistance of both the appellant and John Othieno. The learned judge did not accept the evidence of Othieno whom he found to be ". . . a dishonest witness who was making

contradictory statements in the same breath." The trial judge accepted that both

the confessions to the police were voluntary and were properly admissible in evidence, and found the confessions to be true and to have been corroborated by other material and independent evidence. The independent evidence to which he referred were (*a*) the fact that the first accused after making his first statement to the police took the police to the factory and showed them the exact place where he had killed the deceased and where he had hidden and how he escaped; (*b*) that the first accused had been seen on the night of February 27 with the appellant at the factory, and (*c*) that he had mentioned certain material facts in his statement concerning the plot to kill which clearly showed his complicity in the plot. These facts were (i) that he knew that Osendo was concerned with the appellant in the plot to kill the deceased; (ii) that the appellant had attempted to get one Massimiliano Owori to do the killing, and (iii) that the appellant had made a telephone call to the deceased in order to bring him to the factory for the murder to be committed.

In his evidence the first accused completely denied having anything at all to do with the murder. He admitted signing the note book and the four sheets of his last statement but stated that he was forced to do so after prolonged beating and questioning and because he was frightened.

The learned trial judge accepted the prosecution's case and rejected the defence and convicted the first accused of murder.

The case against the appellant depends again largely on a confession to the police made while he was in custody. This confession was made after he had been kept for some nine days in custody without apparently having been taken to court or charged for the offence. This point was stressed by Mr. Dalal, his advocate, in submitting that his confession had not been a voluntary confession and should not have been received in evidence. It will be necessary to examine the evidence on this matter in some detail.

The murder took place on the night of March 1, 1967, and it appears that the police took all the workers present at the factory that night to the police station. This was not unreasonable having regard to the fact that the murder did appear on the face of the known facts to have been an "inside" job. However, it appears that the police continued to keep all these possible witnesses in custody for some days. The witness, Mr. Anson, who was no longer in the police force when he gave evidence but was at the time of the murder an Assistant Superintendent of Police attached to the Central C.I.D. in Kampala, stated that the witnesses including the appellant were kept in custody, although some were allowed to go away from time to time. He said the appellant was kept in custody until the 11th when he was arrested. No attempt was made by the prosecution to correct Mr. Anson's evidence and we must accept that this did occur. This procedure appears to show a complete disregard of a citizen's right to his personal liberty. This right had always existed in Uganda but it is now entrenched in the Constitution of Uganda. Article 19 provides that no person shall be deprived of his personal liberty save as may be authorized by law. This Article then proceeds to set out the various cases in which this can be done. These cases do not include a right to take a witness into custody pending an investigation into a crime. If witnesses are to be kept at a police station then it must be done with their consent and not by force. If it is desired to detain a person against his will then his detention must be authorized by law, and after a person is so detained or arrested then he must be informed as soon as reasonably practicable, and in a language that he understands, the reason of his arrest or detention and if he is arrested or detained for the purpose of bringing him before a court in execution of the order of the court or on a reasonable suspicion of his having committed or been about to commit a criminal offence under the Laws of Uganda then he shall be brought without undue delay before a court. These are the safeguards and rights set out in our Constitution, but apart from these we would also refer

to the provisions of the Criminal Procedure Code (Cap. 107) which provides when a police officer may arrest without a warrant and also provides the procedure to be followed when this is done. We would in this respect refer to ss. 23, 27, 30, and 31 of the Code.

The appellant, along with the other witnesses, was taken to the police station on March 1 and according to the appellant he was kept outside, near a counter, until March 6 when he was put into a cell until March 13 when he was first taken before the court. The prosecution's case shows that he made a statement at midnight on March 1 or 2, 1967 in which he denied any complicity in the murder, and then he made no further statement until March 10, 1967 when he started to make the series of statements admitting his complicity in the murder. The first was made to Detective Corporal Omoding on March 10. This was ruled inadmissible as the judge found that the appellant was in custody and had not been cautioned before he made that statement. As a result of what he said to Omoding, the appellant was then seen by Assistant Superintendent of Police Anson. Anson cautioned him and he made a verbal statement which the judge admitted in evidence. Anson then referred the case to Sergeant Opoya who charged and cautioned the appellant and took down a written statement from him in Dhopodhola language. This statement was admitted in evidence after a trial within a trial. It is clear that the appellant was kept in custody from March 1, 1967 and that he does not appear to have been charged until March 11, 1967 and taken before a magistrate on March 13, 1967. It does, however, appear that in his case the police would have had reasonable grounds to suspect that he was a party to the murder, and might have been justified in arresting him without a warrant on March 1 or 2. We would refer to the fact that the murder had occurred on the factory premises where he was, and there was evidence to show that he had caused the deceased to come to the factory on a false report, and then that he had denied this in his statement.

The fact that the necessary safeguards provided for by law had not been carried out following his arrest would not of itself prevent a voluntary confession of guilt by an accused person being accepted as evidence against that person provided that the judge had properly directed himself on the law and on the facts and had especially borne in mind the possible effect that the prolonged detention might have had on the mind of an accused.

The learned judge considered this aspect of the case. He refers in his ruling on the confession made to Anson to the appellant's advocate's submission on this point and also on the question as to whether the appellant had been questioned on several occasions during his detention. The judge also dealt with the allegations made by the appellant that he had been beaten. In the end he accepted the prosecution's case and found that the statements made by the appellant to Anson and the written statement to Sgt. Opoya had been freely and voluntarily made after proper caution.

Mr. Dalal relied on the case of *Njuguna s/o Kimani v. Reg.* (1954), 21 E.A.C.A. 316. That case, which has repeatedly been cited with approval in this Court, is authority (*inter alia*) for three propositions:

(*a*) that it is highly improper for the police to "keep a suspect in unlawful custody and prolong their questioning of him by refraining from formally charging him";

(*b*) that the judge has a discretion to exclude a statement which has been obtained by improper means, even though it is not inadmissible under any specific rule; and

(*c*) that a formal caution is of little significance when "given to a prisoner who has been in the police officer's custody for weeks, and who has previously been induced by questioning to incriminate himself".

In the present case, the appellant had been wrongfully held for nine days and claims that he had repeatedly been interrogated. The learned judge made no express finding on this claim, but he did consider it. We have given anxious consideration to the question whether, on the principles set out in *Njuguna's* case (1), the confession ought not to have been excluded. However, after considering all the circumstances and having regard to the fact that the learned judge applied his mind to the relevant considerations, we are not prepared to say that he was wrong in admitting the confession.

The appellant's statement to Corporal Omoding was not admitted but his evidence that he called him and spoke to him was, and then followed his report to Assistant Superintendent Anson and then Anson's conversation with the appellant and the written statement taken by Sgt. Opoya on Anson's directions. These were all in effect a continuous act and were not really separate confessions but these various acts did explain how the appellant came to make his final written statement to Sgt. Opoya and supported the prosecution's case that this was a voluntary confession. In his judgment the trial judge considered the full and detailed statement given by the appellant to Sgt. Opoya and came to the conclusion that this statement "cannot but be true".

The judge looked for corroboration of the appellant's written confession and he found this in:

(*a*) his oral statement to Anson that Osendo had approached him with the plan to kill the deceased;

(*b*) the fact that the appellant had been seen with the first accused in the pipe plant on February 27;

(*c*) that Osendo at the time the deceased was found dead had held the appellant by his arm and said "tell him what happened".

In this respect, as we have already said, the oral confession to Anson, whilst evidence in support of the fact that the written statement was genuine and voluntary, was in effect one continuous act, and this should not be considered as corroboration of the facts stated in his written confession. We also considered that the words used by Osendo could have but little if any weight, as evidence against the appellant. Osendo was not called and, although the witness who described this incident gave evidence of what Osendo did, he gave no evidence as to the appellant's reaction to this rather cryptic remark. The fact, however, that the appellant had been seen with the first accused at the factory on February 27, 1967 was definitely corroboration, especially as this is denied by the appellant in his evidence but was fully referred to in his written confession.

There is also the evidence of Massimiliano Owori, to the effect that the appellant saw him on October 15, 1966, and said he wanted to kill a foreigner at the factory who had given him a lot of trouble. This happened some 4½ months before the murder, but the trial judge accepted this evidence and this fact is also mentioned in the first accused's confession and was one of the factors relied on by the judge in accepting that the first accused's confession was true. It must be noted here that the judge correctly directed himself on the weight to be placed on the confession of each accused in so far as it involved the other accused person. He did not rely on this as evidence to convict the other accused person.

Then there is evidence of the appellant's telephone call which brought the deceased to the factory. This was very important and vital evidence because, if this was a false report done in order to bring the deceased to the factory, then here was direct evidence of the appellant's complicity in the plot to kill and evidence most materially corroborating the appellant's confession of guilt. Both the assessors accepted that this telephone call was a false report and a trap to

kill the deceased. The trial judge has not dealt with this aspect as fully as he might have done but the fact that he accepts the prosecution's case and finds the appellant guilty must in our view mean that he accepts that this telephone call was a trap done in furtherance of the plot to murder the deceased. That this is so is also borne out by the fact that the appellant completely omits any reference to this telephone call or of any defect to the machinery in his statement to the police on the night of the incident. In that statement he said that he told the deceased that there was nothing wrong with the machinery.

We are of the view that on the evidence accepted by the trial judge that he must inevitably have come to the conclusion that the appellant was guilty of murder, and accordingly we dismiss the appeal.

Appeal dismissed.

For the appellant:
SH Dalal
Dalal and Singh, Kampala

For the respondent:
S Manyindo (State Attorney, Uganda)
Attorney General, Uganda

Kiska Ltd v De Angelis
[1969] 1 EA 6 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	17 July 1968
Case Number:	9/1968 (127/68)
Before:	Sir Clement de Lestang Ag P, Spry Ag V-P and Law JA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Dalton, J

[1] Civil Practice and Procedure – Set-off and counterclaim – Defendant succeeds in counterclaim and gets judgment for more than plaintiff's claim – Correct form of judgment.

[2] Costs – Appeal – Principles on which appellate court should interfere with order for costs made by trial Court.

[3] Costs – Evidence de bene esse – Successful party should have costs of.

[4] Costs – Set-off and Counterclaim – Defendant getting judgment for more than plaintiff's claim – What order should be made for costs.

Editor's Summary

The respondent sued the appellant for Shs. 69,765/20. The appellant filed a set-off and counterclaim. After the evidence of one witness had been partially taken de bene esse the appellant admitted the respondent's claim in full and by consent the set-off and counterclaim were referred to a referee for decision. The referee found that the respondent owed the appellant Shs. 6,442/80. The judge below then gave judgment for the respondent for Shs. 69,765/20 with costs and for the appellant for Shs. 76,408/- with costs. He ordered the costs of the evidence de bene esse to be paid by the respondent and the costs of the reference to be shared equally. The appellant appealed against these orders for costs.

Held –

(i) the proper procedure should have been for the judge to enter judgment for the appellant for the balance due to it with costs; and the judge should not have given the respondent costs on his claim;

(ii) the appellant, as the successful party, should have had the costs of the evidence de bene esse;

(iii) the appellant, as the successful party, should also have had the costs of the reference.

Observations (per de Lestang, Ag. P.) as to principles on which an appellate court should interfere with an order for costs made by a trial court.

Appeal allowed with costs.

Cases referred to in judgment:

(1) *Devram Nanji Dattani v. Haridas Kalidas Dawda* (1949), 16 E.A.C.A. 35.

(2) *Donald Campbell v. Pollak*, [1927] A.C. 732.

(3) *Provincial Bill Posting Co. v. Low Moor Iron Co.*, [1909] 2 K.B. 344.

(4) *Chell Engineering Ltd. v. Unit Tool and Engineering Co. Ltd.*, [1950] 1 All E.R. 378.

(5) *Childs v. Blacker*, [1954] 2 All E.R. 243.

July 17, 1968. The following considered judgments were read:

Judgment

Sir Clement De Lestang Ag P: This is an appeal on costs. On March 19, 1965, the respondent, who was the plaintiff in the court below (hereinafter called the plaintiff), sued the appellant (hereinafter called the defendant) to recover Shs. 69,765/20 cents for arrears of salary and for payment of a sum of money received by the defendant on his behalf. The defendant denied the claim and by way of counterclaim and set-off claimed damages for breach of contract from the plaintiff. The plaintiff, by his reply, denied the defendant's claim.

Before the case came on for trial the evidence de bene esse of a witness who was leaving the country was taken on the application of the defendant but not concluded. On October 27, 1965, the defendant admitted the plaintiff's claim in full and by consent of the parties the court in effect referred the matters raised in the counterclaim and set-off to a referee for decision. The referee was ordered by a clause of the reference:

> "To transmit the proceedings which he may hold on the enquiry and also to report his own opinion thereon as to any amount due from one party to the other after taking into account the sum of Shs. 69,765/20 admittedly due by the Defendant to the Plaintiffs."

In due course the referee reported to the court that the plaintiff owed the defendant Shs. 6,442/80 cents, whereupon the learned judge after hearing the parties on the question of costs, gave judgment for the plaintiff for Shs. 69,765/20 cents and for the defendant for Shs. 76,408/-.

I pause here to remark that having regard to cl. 3 of the reference, judgment ought to have been entered for the defendant for Shs. 6,442/80 cents and not for both parties as was done here. It would appear, however, that judgments were entered as they were by consent of the parties and the judge was probably misled by Mr. Sirley's uncontradicted but inaccurate statement that judgment had been entered on October 27, 1965, for the plaintiff, for Shs. 69,765/20 cents. Be that as it may, there could not be, and there is, no appeal against the form of the judgments. As regards the costs, the learned judge said:

> "As to costs the plaintiff will have the costs of his claim and the defendants the costs of the counterclaim. The

costs arising out of the application for the evidence de bene esse of Mr. D. Rocco and the costs of the hearing are awarded to the plaintiff. Costs of the application to amend the defence awarded the plaintiff.

> Costs arising out of alleged breach of contract is instruction fees to defend and getting up fees awarded the plaintiff. Concerning the costs of the referee it seems to me that the necessity for the referee did not arise solely out of the conduct of one or the other of the parties and I consider that such costs should be shared equally by the parties."

The defendant appeals from the order for costs in three respects; namely;

(*a*) the award of costs to the plaintiff on his claim;

(*b*) the award to the plaintiff of the costs arising out of the application for taking evidence de bene esse; and

(*c*) the sharing of the costs of the reference equally between the parties.

Before considering the merits of the appeal it is convenient to refer briefly to the law applicable. Section 27 (1) of the Civil Procedure Act, while giving the court a wide discretion as to the costs of a suit, contains the following proviso:

> "Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

In *Devram Nanji Dattani v. Haridas Kalidas Dawda* (1949), 16 E.A.C.A. 35, the Court of Appeal held that a successful defendant can only be deprived of his costs when it is shown that his conduct, either prior to or during the course of the suit, has led to litigation which, but for his own conduct, might have been averted. In that case, the following passage from the judgment of Lord Atkinson in *Donald Campbell v. Pollak*, [1927] A.C. 732 at p. 813 was applied:

> "It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts . . . If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of the sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance."

Thus, where a trial court has exercised its discretion on costs, an Appellate Court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule.

I now proceed to consider the three items of costs attacked in the appeal in the light of the above principles. As regards item (*a*), the parties, having agreed to judgments for both the plaintiff and the defendant, the learned judge in awarding each party its costs did not, on the face of it, depart from the rule that costs shall follow the event and normally his order in such a case could not be impugned. It appears, however, that, misled by one of the advocates, he failed to realise that the defendant's set-off and counterclaim were defences to the plaintiff's claim and that the proper order to make in such a case is to enter judgment for the balance due, with costs, unless there are good reasons to deprive the defendant of his costs (see 34 Halsbury's Laws (3rd Edn.) p. 423, para. 753). It seems to me, therefore, with respect, that the learned judge was wrong to allow the plaintiff any costs on his claim and I would set aside that order.

As regards (*b*), the cost of the evidence de bene esse, as it solely concerned the counterclaim and set-off on which the defendant was successful, there was a clear departure from the rule for which no reason was given by the learned judge. With great respect, I can find no ground for depriving the successful defendant of his costs in this matter and in the absence of good reason he is entitled to them.

As regards (*c*), the cost of the reference. Here again the learned judge gave no good reason for his award. The reference dealt entirely with the counterclaim and set-off and nothing else and the defendant, having been successful, is entitled to his costs.

I would accordingly allow the appeal and order that paras. 1 to 4 inclusive of the decree be deleted and replaced by the following new paras. 1, 2 and 3:

> "1. By consent, that there be judgment for the plaintiff for shs. 69,765/20 on the claim and for the defendant for shs. 76,408/- on the counterclaim.
>
> 2. That the plaintiff do pay to the defendant his costs including the costs of taking the evidence of Mr. Rocco de bene esse and the costs of the reference.
>
> 3. That the defendant do pay to the plaintiff the costs incurred by amending the defence and by that part of the counterclaim alleging breach of contract including instruction fees to defend and getting-up fees in respect of such part of the counterclaim."

I would award the appellants the cost of this appeal. As the other members of the Court agree, it is ordered accordingly.

Spry Ag V-P: I have had the advantage of reading in draft the judgments of de Lestang, Ag. P., and Law, J.A., with which I am in complete agreement and I would only add a few observations.

Under Ord. VIII, r. 13, of the Civil Procedure (Revised) Rules, 1948:

> "13. Where in any suit a set-off or counterclaim is established as a defence against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case."

This rule was taken verbatim from what used to be Ord. 21, r. 17 of the English Rules of the Supreme Court, of which Kennedy, L.J. said, in *Provincial Bill Posting Co. v. Low Moor Iron Co.*, [1909] 2 K.B. 344:

> "Now, however, a counterclaim may in ordinary cases be established, and if it exceeds the amount recovered on the claim the Court has power to give judgment for the defendant for the balance, if it thinks it right to do so; and similarly judgment for the balance may be given for the plaintiff if the amount recovered on the claim exceeds that recovered on the counterclaim. But the Court must consider in each case whether it would be right to give judgment for the balance, and if it would not be reasonable or right to deal with the claim and counterclaim by a judgment for the balance, then judgment should be given for the plaintiff on the claim and for the defendant on the counterclaim, costs following in each case."

In that case there was a good reason for not giving judgment for the balance, because the plaintiff company had gone into liquidation.

The passage I have quoted was referred to by Singleton, L.J. in *Chell Engineering Ltd. v. Unit Tool and Engineering Co. Ltd.*, [1950] 1 All E.R. 378, who went on to say that:

> "It is usually better that the judgment should be in the form to which I have been accustomed, namely, judgment for the plaintiff for so much on the claim with costs and for the defendant for so much on the counterclaim with costs. That course prevents an involved argument about the difference between set-off and counterclaim."

In that case, however, the court was concerned with the question, the balance being very small, whether it entitled the successful party to costs on the High Court scale. It may be added that in that case Denning, L.J. (as he then was) said:

> "I would only add that in most of these cases it is desirable that a judge should consider whether a special order should be made as to costs because the issues are often very much interlocked, and the usual order of 'judgment for plaintiff on claim with costs and for defendant on counterclaim with costs' does not always give a just result."

The decision in the *Chell* case was explained in *Childs v. Blacker*, [1954] 2 All E.R. 243, which is in some ways comparable with the present case, because it was one where the claim was not contested and the only issue was on the counterclaim. In the event, the plaintiff recovered a small balance, though less than the defendant had tendered. Lord Goddard, C.J. said:

> ". . . the only question fought was the question of the counterclaim for breach of contract, as it in fact was, whether one calls it counterclaim or set-off . . . It is then said that, although the plaintiff has recovered less than the sum that had twice been offered to him, he should have substantially the whole of the costs of the proceedings, because, if he gets the costs on the claim and the defendant the costs of the counterclaim, the general costs of the action will go to him. The learned judge made that order, with the result that the defendant, who had been successful in the matter which was litigated, might have been left to pay very substantial sums of money to the plaintiff for his costs, and her costs . . . In those circumstances, it seems to me only fair that the defendant should have the costs of the action."

It seems to me that the reasoning in that case applies to the present case, where the balance payable was in favour of the appellant company, and should apply whatever the form of the judgment. The position is, of course, entirely different where the counterclaim is of the nature of a cross-action and different issues arise on the claim and the counterclaim.

I would also comment on the form of the decree extracted. The learned judge had said that the plaintiff would have the costs of the claim and the defendant company the costs of the counterclaim. In the formal decree, however, it was said that the plaintiff was to have "the costs for the sum of Shs. 69,765/20" and the defendant company "the costs for the sum of Shs. 76,408/-". I think those are most undesirable and misleading expressions. The amount which a party recovers is only one of the factors, and not necessarily the most important, that a taxing master takes into account when taxing costs in the High Court. It was this, I think, which led counsel, if I understood them correctly, into arguing that the result of the learned judge's order as to costs would result in their more or less balancing out. There is no reason to suppose that this would have been so.

I agree with the order that has been proposed.

Law JA: In the suit out of which this appeal arises, the plaintiff (now respondent) claimed Shs. 69,765/20 for arrears of salary and the defendant (now appellant) counterclaimed for general damages under three heads:

(*a*) failure to account for the proceeds of sale of coffee seedlings,

(*b*) breach of contract in engaging in paid employment for other employers; and

(*c*) breach of contract in engaging in the business of an estate agent;

and the defendant claimed to set-off so much of its claims as would be sufficient to extinguish the amounts found due to the plaintiff. Before the suit was heard, the evidence of a defence witness Mr. Rocco was taken on commission. This evidence was in support of the defendant's claim for a share of the proceeds of sale of coffee seedlings, under para. (*a*) above. On October 27, 1965 the suit was mentioned before Sherrin, Ag. J. in chambers. On this occasion the defendant admitted the plaintiff's claim for Shs. 69,765/20, and the dispute as to the proceeds of sale of coffee seedlings was by consent referred to a referee with the instruction that he was to "report his own opinion thereon as to any amount due from one party to the other after taking into account the sum of Shs. 69,765/20 admittedly due by the defendant to the plaintiff". The defendant's claims for damages for breach of contract under paras. (*b*) and (*c*) above were withdrawn. Contrary to what Mr. Sirley for the plaintiff told Dalton, J. on November 16, 1967, no judgment was entered for the plaintiff on October 27, 1965. It is clear from the extract of the order of reference which I have quoted that the referee was to certify, taking into account the admission of the plaintiff's claim, whether the plaintiff was entitled to anything at all after calculating his indebtedness to the defendant in respect of the sale of coffee seedlings. In the event the referee found, after giving credit for the whole of the plaintiff's claim, that the plaintiff owed the defendant a balance of Shs. 6,642/80, a figure which was accepted by the parties. Thus the defendant's defence by way of counterclaim and set-off was successful, not only in that it extinguished the whole of the plaintiff's claim, but left the defendant with a balance in his favour. The proper order in such a case was to give judgment for the defendant for Shs. 6,642/80, and not to enter judgment for the plaintiff for Shs. 69,765/20 on his claim, and for the defendant for Shs. 76,408/- on the counterclaim. Dalton, J. was misled by Mr. Sirley's statement (which Mr. Robson for the defendant did not contradict) that there was a judgment on record for the plaintiff for the amount of his claim. The correct order for costs in a case such as this, where the defendant succeeds in establishing a set-off exceeding the plaintiff's claim, is in my opinion as stated in Halsbury's Laws (3rd Edn.), Vol. 34, para. 753: the defendant is entitled to judgment with costs on the claim, and to judgment for any balance recovered on his counterclaim with costs, in the absence of circumstances depriving him of costs. No such circumstances have been shown to exist in this case. No doubt Dalton, J. would have made such an order, had he not been misinformed by the advocates as to the existence on the record of a judgment in favour of the plaintiff for the amount of his claim. In the event Dalton, J. entered judgment for the plaintiff on the claim and for the defendant on the counterclaim. There has been no appeal against this part of his judgment, nor could there be as the parties consented. Dalton, J. also gave the plaintiff his costs, and the defendant his costs. The defendant has appealed against the order for costs made in favour of the plaintiff, and in my view this ground of appeal must succeed, as the learned judge's order was made as the result of a misapprehension of the true facts. The defendant has also appealed in respect of two other matters, the award to the plaintiff of the costs of taking Mr. Rocco's evidence de bene esse and the order that the costs of the reference be paid equally

by the plaintiff and the defendant. Mr. Rocco's evidence was taken and used for the purpose of establishing the set-off and counterclaim, in which respect the defendant was wholly successful. The reference was also concerned wholly with ascertaining the defendant's entitlement under his set-off and counterclaim, the plaintiff having pleaded in his reply that the defendant was not entitled to an account or to any damages. The reference was decided wholly in favour of the defendant, not only to the extent of extinguishing the plaintiff's claim, but also so as to leave a balance in the defendant's favour. For these reasons I am of opinion, with respect, that the learned judge erred in principle in failing to award the defendant the costs of taking Mr. Rocco's evidence and the costs of the reference. I consider that this appeal succeeds on all three grounds. There has been no appeal against the orders awarding the plaintiff the costs resulting from the filing of an amended defence and the costs, including an instruction fee and getting-up fee, incurred by the plaintiff by reason of the counter-claim for damages for two alleged breaches of contract which was not pursued by the defendant. I would allow this appeal, and I concur in the order proposed by Sir Clement de Lestang, Ag. P.

Appeal allowed.

For the appellant:
A Robson
Robson, Harris & Co, Nairobi

For the respondent:
B Sirley
B Sirley & Co, Nairobi

Odindo v Republic
[1969] 1 EA 12 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	1 March 1968
Case Number:	1204/1967 (136/68)
Before:	Sir John Ainley CJ and Trevelyan J
Sourced by:	LawAfrica

[1] Evidence – Admissibility – Opinion evidence by a policeman – Whether it should be admitted – Traffic Act, s. 44 (1) (*Cap.* 403) (*K.*).

[2] Evidence – Drunkenness – Opinion evidence as to, from policeman.

[3] Traffic – Driving under the influence of drink – Opinion evidence by a policeman – Whether it should be admitted – Traffic Act, s. 44 (1) (*Cap.* 403) (*K.*).

Editor's Summary

The appellant was convicted of driving a motor bicycle when under the influence of drink. The evidence was that the appellant was found lying on the road, having fallen off his motor bicycle; and that, when picked up by the police, he was incapable of giving his own name clearly, could not tell the time by the clock and could not stand on one leg. When interviewed by a doctor half an hour later, the appellant refused to be examined, but the doctor gave evidence to the effect that the appellant was clearly incapable of handling a motor-vehicle and that unless he were suffering from diabetes or any head injury or shock, he was, in the doctor's opinion, drunk. No evidence was given by the appellant in regard to the presence of any of the disabilities mentioned by the doctor. A police inspector gave evidence to the effect that, in his opinion, the appellant was completely incapable of having control of a motor vehicle and no objection to this evidence was taken by the appellant's advocate.

Held –

(i) the evidence that the appellant fell off his motor bicycle and was picked up and thereafter behaved as a drunken man, would lead any reasonable man, in the absence of any other evidence to set against it, to the conclusion that the appellant was incapably drunk;

(ii) the attempt by the police inspector to qualify as an expert witness should have been discouraged by the court, although it did not, in fact, add anything to the case.

Appeal dismissed.

Cases referred to in judgment:

(1) *Samuel Chege Kiuri v. Republic*, (Kenya High Court Criminal Appeal No. 20 of 1966) (unreported).

(2) *R. v. Davis*, [1962] 3 All E.R. 97.

Judgment

Sir John Ainley CJ: read the following judgment of the Court: In this case the appellant was convicted of driving a motor bicycle when under the influence of drink contrary to s. 44 (1) of the Traffic Act.

It is clear that on the evening of April 11 last year the appellant was riding a motor bicycle along Doonholm Road. He fell off the motor bicycle, and at 9.30 p.m. he was found lying on the road with the motor bicycle not far from him.

According to Police Sergeant Justus who picked him up, the appellant smelt strongly of alcohol, he could not speak properly, and he could not stand without help. The Sergeant thought that he was drunk, and he took him to the Control Room at 999 Headquarters. There the appellant was interviewed by Inspector David Nene. According to the Inspector the appellant was incapable of giving his own name clearly. He could not tell the time by the wall clock in the room, and he could not stand on one leg with his arms raised horizontally. Sergeant Justus swore that the appellant was given a third test, the finger to nose test, but in this he was clearly mistaken. At this stage it may be mentioned that Sergeant Justus may have exaggerated the appellant's behaviour when, later, he was interviewed by a doctor. Sergeant Justus also declared that the appellant demanded that he be examined by his own doctor and this apparently contradicts what the doctor said. But the learned Magistrate quite clearly accepted the evidence of the Inspector and the evidence of the doctor (to which we shall refer in a moment) and he was perfectly entitled to do this even if, as may have been the case, Sergeant Justus was disposed to give stronger evidence against the accused than was justified by the facts.

Dr. Ambalal Patel interviewed the appellant at about 10 p.m., in the Police Surgery. He was with the appellant for about half an hour. He said, "He was waving his hands and saying that he did not wish to be examined by any doctor. His eyes were slightly suffused, and his speech slightly slurred. He was moving about. He was slightly unsteady in his gait. I could smell alcoholic breath from across the table . . ." He added, "If accused had not been suffering from diabetes or any head injury or shock or any other nervous condition which would have caused similar symptoms, then in my opinion he was drunk to an extent as to be incapable of having proper control of the vehicle." He went on to say, "The only sentence that he kept repeating was that he did not want to be examined. He did not talk on any other topic. He looked to be drunk, but in the absence of a medical examination I could not form a conclusive opinion." What the

doctor was saying here, quite obviously, was that he would not, without a full examination, say definitely that the accused's condition was due to drink. That his condition rendered him incapable of handling a motor vehicle

safely he had no doubt whatever. He said, “I would not have travelled with him if he had been driving a car in that condition.” It will be remembered that the motor vehicle the appellant sought to control was not a motor car, which balances on four wheels, but a motor bicycle. There is indeed no real doubt in this case that the appellant was quite incapable of controlling a motor bicycle when he was picked up by Sergeant Justus, or for an hour or so thereafter. As the appellant stated on oath that he suffered from no disease which would affect his mental state or capabilities there was and is only one question worth asking in this case, and that is whether the appellant’s condition was due to shock or injury as a result of his fall on the roadway, or whether it was due to the drink which he had very obviously taken.

The appellant was bruised on his forehead and face, and the doctor observed slight bleeding from his forehead, but he said, “The accused’s injuries did not look to be serious.” Moreover the appellant, who was represented by counsel, and who gave evidence on oath, never suggested for one moment that during this half hour interview with the doctor he was dazed, or shocked, or partially stunned. He said (in effect) that he was dazed (a little unconscious) when he fell off his motor bicycle, but that he sat recovering for half an hour, and indeed recovered sufficiently to hear and remember the remarks of bystanders. He professed to remember clearly what happened after the police picked him up and denied, in effect, that there was anything wrong with his mental state or behaviour when the doctor was talking to him. The doctor, he said, was a liar.

It is of course wrong to convict a man simply because his defence is weak, or mistaken, or false, but here a man smelling of drink fell off his motor bicycle, and was picked up and thereafter behaved as a drunken man would behave. The positive evidence was there, and it was strong evidence. There was no evidence to set against it, save what the learned Magistrate most reasonably held to be an untrue story by the appellant. We do not think that a reasonable man reading this record could fail to doubt that the appellant was incapably drunk when he fell off his motor bicycle and lay in Doonholm Road to be collected by the police.

We would not indeed have written so long a judgment had it not been that, as Mr. Hobbs very fairly pointed out, some “opinion evidence” was given by a policeman in this case. Inspector Nene said:

> “I have been in the police force for six years. I have experience of dealing with drunken drivers. That is my main job on Control as all drunken drivers are first examined by me and I decide whether a driver is drunk to an extent as to be incapable of having proper control of driving before I call the doctor. I get about two to three cases of drunken driving every day in a shift of eight hours. I have a vast experience in dealing with drunken driving. In my opinion the Accused was completely incapable of having proper control of a motor vehicle. But that was to be confirmed by the doctor as I am not an expert. I would never have agreed to travel in a car driven by the Accused in the condition he was then.”

No objection was taken to that evidence by the appellant’s counsel either in this Court or in the court below. Objection could however have been taken. In the case of *Samuel Chege Kiuri v. Republic* (Criminal Appeal No. 20 of 1966), this Court said:

> “It is of course one thing to express an opinion that a man has been drinking and is in the condition which most men would call drunk, and another to say that he is because of drink unable properly to perform a particular task, such as driving a car. It was held in the English case of *R. v. Davis*, [1962] 3 All E.R. 97, that a layman should not be permitted

> to express an opinion on such a matter. The English courts may possibly be thought to have taken too narrow an outlook on this question, and we are given to understand by an article in Vol. 77 of the Law Quarterly Review, to which Mr. Hobbs helpfully referred us, that in America and Ireland a broader outlook is taken. It is not perhaps easy to see why an experienced motorist, fully aware of the co-ordination of mind and muscle, the judgment, the clarity of vision and so on which are required safely to drive a car, and who has the ordinary faculties of observation should not be permitted to say, in effect, 'That man seemed to me to be drunk, at any rate he gave me the impression that he had taken a great deal of drink, and as he could not walk, talk, stand or even see properly I thought him incapable of driving properly.'
>
> We think however that it is unwise and indeed improper to receive such opinion evidence from a layman.
>
> The opinion is unnecessary if the lay witness can state facts from which an advanced stage of intoxication can be deduced, e.g. 'the man could not stand – he reeked of liquor, and was trying, ineffectively, to sing.' If however the evidence relied on as showing that the accused is badly affected by alcohol is not strong, it is not really strengthened by the kind of opinion we have been discussing, and the attempt to strengthen it by that sort of opinion should not be permitted. Weak or inconclusive evidence can however be strengthened by a medical opinion formed after careful tests by a doctor who does appreciate what the driving of a car involves."

What Inspector Nene was trying to do, fairly clearly, was to qualify as an expert on drunken driving, and we are satisfied that the attempt should have been discouraged. It was, in any event, an unnecessary attempt. The Inspector believed that this man was drunk, he was entitled to say so, and as we have already said there was no doubt about that matter. There was the doctor's evidence that the appellant's condition rendered him incapable of controlling a motor vehicle properly, and on the facts stated, leaving the opinion evidence aside, there was no real doubt about that matter either. The Inspector's opinion did not in truth add much, or indeed anything, to the State's case and without it we think that the learned Magistrate would inevitably have convicted. The appeal against conviction is therefore dismissed. The sentence was not excessive and the appeal against sentence is also dismissed.

But we would add that in a case where the facts were not so clear the admission of this kind of evidence might well be fatal to a conviction. Police officers, though they, like every other member of the public, may say whether a man appeared to have taken more drink than was good for him, should confine their evidence thereafter to the facts. Let them state, for example, whether the man could stand, walk, and talk properly, leaving questions as to the man's ability to drive to the doctor, and if there is no doctor, leaving the court to decide the question unaided by opinion evidence.

Appeal dismissed.

For the appellant:
MD Patel
MD Patel, Nairobi

For the respondent:
JR Hobbs (Deputy Public Prosecutor, Kenya)
Attorney General, Kenya

Karuria v Republic

[1969] 1 EA 16 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	13 March 1968
Case Number:	1250/1967 (137/68)
Before:	Rudd J and Miller J
Sourced by:	LawAfrica

[1] Criminal Law – Prostitution – Living on the earnings of a prostitute – Whether prostitute herself guilty of – Penal Code, s. 154 (*Cap.* 63) (*K.*).

Editor's Summary

The appellant was a prostitute living on her own earnings and was convicted on a charge of knowingly living on the earnings of a prostitute contrary to s. 154 of the Penal Code. The section reads as follows: "Every woman who knowingly lives wholly or in part on the earnings of prostitution, or who is proved to have, for the purpose of gain, exercised control, direction or influence over the movements of a prostitute in such a manner as to show that she is aiding, abetting or compelling her prostitution with any person or generally, is guilty of a misdemeanour."

Held –

(i) the latter part of the section clearly refers to a woman who is not herself a prostitute and the first part of the section must be read ejusdem generis with the latter;

(ii) the section does not intend to make every prostitute living in whole or in part on her own earnings guilty of an offence within the section.

Appeal allowed.

No cases referred to in judgment

Judgment

The following judgment of the Court was read by **Rudd J:** The appellant was convicted on her plea of knowingly living on the earnings of prostitution contrary to s. 154 of the Penal Code. She has appealed against her sentence of six months' imprisonment.

The prosecutor's statement of facts led us to believe that the appellant was probably a prostitute living on her own earnings as such and State Counsel confirms that this was in fact the position and that there is nothing to indicate that the appellant lived in whole or in part on the earnings of any other prostitute.

In the circumstances we thought it proper to consider whether or not the facts constituted an offence under the section.

The section reads as follows:

"Every woman who knowingly lives wholly or in part on the earnings of prostitution, or who is proved to

> have for the purpose of gain, exercised control, direction or influence over the movements of a prostitute in such a manner as to show that she is aiding, abetting or compelling her prostitution with any person, or generally, is guilty of a misdemeanour."

The latter part of the section clearly refers to a woman who is not herself the prostitute and the question is whether the first part of the section should be read ejusdem generis with the latter part or whether it applies to the prostitute herself.

Section 153 (1) (*a*) is the corresponding provision as regards a male person to the first part of s. 154 and s. 153 (ii) corresponds as regards a male

person to the latter part of s. 154. However there is a difference in the two sections inasmuch as under s. 153 (1) (*b*) it is an offence for a male who "in any public place persistently solicits or importunes for immoral purposes". This is not provided for as regards a woman in s. 154.

There appear to be no decisions on this matter. The corresponding English legislation in the Criminal Law Amendment Act 1912 is couched in different language and that Act would not apply to a prostitute living on her own earnings as a prostitute.

In our opinion the first part of s. 154 of the Penal Code should be construed ejusdem generis with the second part of that section.

If it was intended to make every prostitute who lived in whole or in part on her own earnings as such guilty of a misdemeanour, we think that should have been clearly stated and further we think it would be surprising that she should be liable to as heavy a sentence as two years' imprisonment which is the maximum general term of imprisonment for a misdemeanour.

It follows that on the facts intended to be admitted by the appellant and indeed on the true state of the facts the plea should not have been accepted as a plea of guilty to the offence charged. We therefore set aside the conviction and sentence and acquit the appellant.

Appeal allowed.

No appearance by the appellant.

For the respondent:
HGD Graham (State, Council, Kenya)
Attorney General, Kenya

Njoroge v Republic
[1969] 1 EA 17 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	7 June 1968
Case Number:	279/1968 (138/68)
Before:	Farrell Ag CJ and Miller J
Sourced by:	LawAfrica

[1] Criminal Law – Aiding and abetting – Whether charge of aiding and abetting in the possession of property is competent – Wild Animals Protection Act – ss. 33 (5) *and* 47 (3) (*Cap.* 376) *– Penal Code, s.* 20 (1) (*c*) (*Cap.* 63) (*K.*).

[2] Criminal Law – Possession of property suspected of having been stolen – Whether a charge of aiding and abetting the commission of this offence is competent – ss. 33 (5) *and* 47 (3) *Wild Animals*

Protection Act (*Cap.* 376) (*K.*) – *Penal Code*, *s.* 20 (1) (*K.*) (*Cap.* 63) (*K.*).

Editor's Summary

The appellant was convicted of unlawful possession of a game trophy, contrary to s. 33 (5) read with s. 47 (3) of the Wild Animals Protection Act. The court found as a fact that two police officers in plain clothes were taken to the appellant's house to buy ivory. The appellant took the party in a car into the forest to fetch the ivory and as the car in which they were travelling stuck in mud, the appellant and others left the car and returned an hour later with a man called Mwaniki who had a sack containing four small elephant tusks. When the police officers revealed their identity and attempted to arrest the suspects, all ran off except the appellant who was apprehended and charged. The magistrate was not satisfied that, on the evidence, the appellant was in

possession of the trophies but found that the circumstances suggested that the appellant knew that Mwaniki's possession of the ivory was unlawful and that he was assisting Mwaniki in making that possession a source of profit. The appellant was therefore convicted of the main offence by virtue of s. 20 of the Penal Code.

Held –

(i) nothing was known of the circumstances in which Mwaniki came into possession of the tusks and the appellant could not, therefore, be guilty of having aided and abetted him;

(ii) where the offence was complete before the aid or abetment is given to the offender, the aider or abettor cannot be made liable under s. 20 (1) (*c*) of the Penal Code.

Appeal allowed.

Cases referred to in judgment:

(1) *R. v. Watson*, [1916] 2 K.B. 385.

Judgment

The following reasons for the judgment of the Court were read by **Farrell Ag CJ:** The appellant was convicted on a charge of unlawful possession of a game trophy, contrary to s. 33 (5) read with s. 47 (3) of the Wild Animals Protection Act and was sentenced to 12 months' imprisonment. He appealed against his conviction and sentence. At the hearing State Counsel did not support the conviction, and we quashed it and set aside the sentence. We now give our reasons for doing so.

The learned magistrate found the following facts proved. On December 5, 1967, two police officers in plain clothes were taken in a car to the house of the appellant, who was informed that one of the police officers wished to buy ivory. The appellant took the party in a car into the forest to get ivory for them. On the way the car got stuck in the mud. The police officers were left in the car while the appellant and others left the car and proceeded on foot into the forest. About an hour later the party returned with a man called Mwaniki and a sack containing four small elephant tusks. The appellant asked one of the police officers if he wished to buy them, and on his saying that he did, the tusks were weighed. After some haggling a price of Shs. 7/- per lb. was agreed on, and the tusks were put into the car. The car was pushed out of the mud, and the party including the appellant, Mwaniki and the two police officers drove off. When they reached the firm road, one of the police officers revealed that he was a police officer and that he was putting the offenders under arrest. There was some confusion after that, and some shots were fired, but Mwaniki and two other men escaped into the darkness. The appellant was held, was taken to the police station and charged with the offence.

The magistrate was not satisfied on the evidence that the appellant was in possession of the elephant tusks, and nobody would quarrel with this finding. But he goes on:

> "The circumstances in which he (sc. the accused) arrived with Mwaniki and the others and the ivory strongly suggest that he knew that the possession by Mwaniki was unlawful, and that he was assisting him in making that possession a source of profit. The accused would, therefore, be aiding Mwaniki in his possession; and under s. 20 of the Penal Code he would be guilty of the offence charged."

We do not dissent from the inference that the appellant had guilty knowledge at the time or that he was

assisting Mwaniki to dispose of the ivory in a profitable

manner. But we do not think that s. 20 of the Penal Code applies so as to make him guilty of possession as charged. We assume that the magistrate was relying on para. (*c*) of sub-s. (1), under which "every person who aids or abets another person to commit the offence" is deemed to have taken part in committing the offence and may be charged with actually committing it. Let it be assumed that Mwaniki was in possession of the tusks. We know nothing of the circumstances in which he obtained possession, nor is there any evidence that the appellant aided or abetted him in doing so. Can it then be said that if Mwaniki was already in possession of the tusks, the appellant aided or abetted him in his possession? We do not think so, nor do we know of any case in which a person has been found to have aided and abetted or, in terms of English law, to have been an accessory before or after the fact to an offence of this nature. In *R. v. Watson*, [1916] 2 K.B. 385, the appellant had been convicted of receiving stolen goods, and the facts proved were that he had been approached by two other men who wished to dispose of some stolen jewellery. The appellant, after crossing a ferry in their company, went alone to a jeweller's shop and asked the jeweller if he would buy 36 oz. of gold. The jeweller refused and the three men were arrested later the same day, and charged (*inter alia*) with receiving stolen property. All three were convicted. In his summing up the recorder directed the jury that if the appellant assisted his companions to get rid of stolen goods "then he has been aiding and abetting them and you can convict him of receiving the goods knowing them to be stolen". In so far as possession is an essential ingredient of a charge of receiving (ibid. at p. 389), the direction of the recorder, if correct, would lend support to the finding in this case that the appellant was aiding and abetting Mwaniki. But the appeal was decided on the question whether the appellant Watson could be convicted of receiving, and turns on the somewhat peculiar provisions of the English Accessories and Abettors Act, 1861. In brief it was decided that a person charged with receiving could not properly be convicted of aiding and abetting a receiver, and the question whether a person who negotiates for the sale of goods which he knows to be stolen can be held to aid and abet the receiver was not in issue. Section 20 (1) (*c*) of the Penal Code is materially different in its effect from the English Act, and no light is thrown by the English decision on the question what amounts to aiding and abetting in the commission of an offence. Approaching the matter without guidance from decided cases, we are inclined to the view that where, as here, the offence is complete before the aid or abetment is given to the offender, the aider or abettor cannot be made liable under s. 20 (1) (*c*) unless he is also an accessory after the fact within the meaning of s. 396 (1), i.e., unless the aid is given in order to enable the felon to escape punishment.

If that is so, the magistrate, having rightly held that the appellant was not himself in possession of the ivory, was in error in holding that he could properly be convicted by virtue of s. 20 (1) (*c*) of the Penal Code. We accordingly agreed with State Counsel that the conviction could not be supported.

Appeal allowed.

No appearance for the appellant.

For the respondent:
JB Karugu (Senior State Counsel, Kenya)
Attorney General, Kenya

Musulu v Republic

[1969] 1 EA 20 (HCK)

Division:	High Court of Kenya at Mombasa
Date of judgment:	5 July 1968
Case Number:	26/1968 (139/68)
Before:	Mosdell J
Sourced by:	LawAfrica

[1] Traffic – Dangerous driving – Causing death by – Whether the appellant's driving, although careless or bad, was dangerous – Traffic Act, s. 46 (*Cap.* 403) (*K.*).

[2] Traffic – Dangerous driving – Causing death by – Whether the dangerous driving was the substantial cause of death – Traffic Act, s. 46 (*Cap.* 403) (*K.*).

Editor's Summary

The appellant was charged with causing the death of a passenger in a lorry being driven by the appellant. The lorry swerved off the road to avoid a bus which was stopped in its path and collided with a tree; as a result of the collision, the deceased received a blow on the head which caused his death. The magistrate, on convicting the appellant, concluded that the appellant's driving was decidedly bad and that bad driving became dangerous when it put persons in danger. The appellant's grounds of appeal were (*a*) that the magistrate did not consider whether the manner of the appellant's driving was a danger to the public and (*b*) that the magistrate failed to consider whether the appellant's manner of driving was a substantial cause of death of the deceased.

Held –

(i) the magistrate clearly concluded that the manner of the appellant's driving was dangerous to persons and by persons, he clearly meant members of the public;

(ii) it was clear that if the appellant had not been driving dangerously there would have been no death; it therefore followed that the dangerous driving of the appellant was a substantial cause of the death of the deceased.

Appeal dismissed.

Cases referred to in judgment:

(1) *R. v. Scammell*, [1967] 3 All E.R. 97.

(2) *R. v. Evans*, [1962] 3 All E.R. 1086.

(3) *R. v. Curphey*, [1957] 41 Cr. App. Rep. 78.

(4) *R. v. Gould*, [1963] 2 All E.R. 847.

Judgment

Mosdell J: Katanga Musulu was on January 28, 1968 convicted by a District Magistrate, Class I, Mombasa, of causing death by dangerous driving contrary to s. 46 of the Traffic Act, Cap. 403. He had pleaded "not guilty". He was fined Shs. 1,500/- or six months' imprisonment in default of payment. His driving licence was to be endorsed with particulars of this conviction under s. 76 (1) (*e*) ibid. Katanga Musulu (hereafter called the appellant) has appealed against his conviction.

At the hearing of this appeal Mr. Bryson for the appellant submitted that:

(*a*) the magistrate misdirected himself in considering whether or not the manner of the appellant's driving was dangerous to the public, and

(*b*) in failing to consider whether or not the appellant's manner of driving was a substantial cause of the death of Kassim s/o Mohamed Lungo, who was a passenger in a seven ton Bedford lorry registration number KKT 605, being driven by the appellant at the material time.

Firstly as to point (*a*). Regarding the manner of the appellant's driving the magistrate said this in his judgment:

> "I have referred myself to *R. v. Scammell*, [1967] 3 All E.R. 97 and it is clear that driving becomes dangerous if it is careless or even bad driving when it puts person(s) in danger.
>
> I consider this was decidedly bad driving by accused and that he was travelling at a speed which, and I have said above, was dangerous and as a result he caused the death of one of his passengers travelling in the lorry.
>
> I find him guilty as charged and convict him."

Mr. Bryson submitted that the magistrate had misconstrued *R. v. Scammell* and that he did not consider whether the appellant had been driving to the danger of the public. In *R. v. Scammell* the trial judge had said in the course of his summing up:

> "I am afraid I must tell you that counsel for the (appellant) is wrong in saying that if you thought this was only careless driving it could not be dangerous."

This passage in the summing up was criticised by his counsel in the hearing of his appeal. In his judgment Sachs, L.J., *inter alia* said this:

> "Counsel for the appellant has even sought in this court to suggest that if the offence were one of careless driving that fact would exclude it from being an offence of dangerous driving. Nothing could be further from the truth. Careless driving may well be dangerous, though all careless driving is not necessarily dangerous driving."

I cannot agree with Mr. Bryson that in this respect the magistrate misconstrued *R. v. Scammell*. It is clear that in the latter case the Court of Appeal held that careless driving could well be dangerous. In the earlier case of *R. v. Evans*, [1962] 3 All E.R. 1086, it was held and I quote from the headnote:

> "If a man adopted a manner of driving which, at his trial on a charge of causing death by dangerous driving, the jury think was dangerous to other road users in all the circumstances, then on the issue of guilt it matters not whether he was deliberately reckless, careless, momentarily inattentive or even doing his incompetent best."

In the instant case the magistrate held that the manner of the appellant's driving was dangerous by reason of his speed but the magistrate could have held, had the evidence warranted such a conclusion, that the appellant's manner of driving was dangerous, were he reckless, careless, momentarily inattentive or doing his incompetent best. The only criticism which can be made in the passage of the magistrate's judgment quoted above is that he refers to person(s) being put in danger and not the public. But it seems to me that the magistrate undoubtedly intended the word "person(s)" to mean "public". In my opinion it would be the merest sophistry to hold that the magistrate by using the word "person(s)" instead of "public" misdirected himself. Was the magistrate justified in reaching the conclusion that the manner of the appellant's driving was dangerous? As to the manner of the appellant's driving in his judgment the magistrate said this:

> "It is obvious that the accused was well conversant with the road from his own evidence, and knew the surface was loose and therefore dangerous. He also knew the road narrowed just before the right hand bend which he was coming towards at the time he saw the 'bus. P.W.4 the headman in the front of the lorry said the driver could see 200 yards ahead and was

> travelling at thirty m.p.h. before reaching the 'bus. The driver agreed this and in his statement to the police said he saw the 'bus 100 yards ahead. He said the 'bus stopped suddenly and in evidence said that was why he had to swerve left. Now knowing the state of the road surface, a 'bus was ahead and just beyond it was a right hand turn in the road, was it safe for a driver of a lorry of that size with sixteen persons and equipment, etc. to approach at the pace he did? The 'bus driver who, I have said, impressed me, said the lorry approached at speed and fast. He was a man with eighteen years' experience of driving heavy vehicles and did not endeavour to guess the m.p.h. the lorry was making.
>
> The accused himself admits he hit the tree when he was doing twenty m.p.h. and I am satisfied that this was after he had passed the 'bus and gone off the road according to the overwhelming evidence. He then went on some distance before stopping.
>
> I am quite satisfied the 'bus was at a standstill when the lorry passed it – (P.Ws. 5, 4 and 7) and I am of the opinion the accused lost control of the lorry because he was travelling too fast under all the circumstances and this caused the accident."

The conclusion of the magistrate that the appellant's driving was dangerous, in my opinion, is amply justified by the evidence. It should perhaps be mentioned that s. 46 of the Traffic Act, Cap. 403, is expressed in exactly the same words as s. 1 (1) of the Road Traffic Act, 1960, of England which was the relevant enactment in the cases of *R. v. Scammell* and *R. v. Evans*, with the exception that s. 46 of the Traffic Act, Cap. 403, includes the causing of death by leaving a vehicle on a road in such a position or manner or in such a condition as to be dangerous to the public.

Regarding point (*b*). This ground of appeal has more substance. It was held in *R. v. Curphey* (1957), 41 Cr. App. Rep. 78 that in order for the prosecution, under s. 8 of the Road Traffic Act, 1956, to succeed, the prosecution must prove that the dangerous driving was "the substantial, although it need not have been the sole, cause" of the death. This was a case in which the prisoner was charged with causing the death of a motor cyclist by the dangerous driving of a motor car, contrary to s. 8 of the Road Traffic Act, 1956, which is expressed in terms similar to those of s. 1 (1) of the Road Traffic Act, 1960. In *R. v. Gould*, [1963] 2 All E.R. 847, a point of law arose as to whether, on the true construction of s. 1 of the Road Traffic Act, 1960, it was open to a jury to convict of the offence when there was more than one substantial cause of death and the accused's conduct was not the sole substantial cause. Brabin, J., directed the jury in that case that the prosecution had to prove that the dangerous driving of the accused was "a substantial cause" and not "the substantial cause" of the death. It was not clear from the evidence in the instant case how Kassim s/o Mohamed Lungo received the blow on the head which caused his death. The medical evidence disclosed that the cause of his death was "Cerebral Haemorrhage and fracture of the skull due to violent injury to the head". Doctor Cortonga, who carried out the post-mortem examination on the body of the deceased said the injury to the deceased's head was on the left hand side of the skull and in cross-examination added:

> "The fracture was from the left-hand front occipital region across the side of the scalp to the rear of the head. There were no external injuries other than this wound. I consider the blow must have been somewhere on the left-hand side of the scalp. The skull of deceased was normal."

None of the deceased's fellow passengers at the back of the lorry at the material time were of any assistance as to how the deceased received the blow on his head.

It seems most probable that the deceased's head struck the coconut tree which was hit by the lorry, but this is mere speculation. Had the evidence of ex-chief Salim Ndaro at the trial been accepted by the magistrate, perhaps this speculation could have been elevated to the status of a finding. But the magistrate was not impressed by the evidence of this ex-chief and felt that because he could not accept his evidence in many instances, it was his duty to ignore it entirely. It is difficult to conceive how the deceased could have received such a severe blow to his head by merely falling to the floor of the back of the lorry to the position in which he was found after the incident. Be that as it may, in my opinion the dangerous driving of the appellant was a substantial cause of the deceased's death for it is clear on the evidence that if the appellant had not been driving dangerously there would have been no death. I do not see how any court could hold, in the circumstances, that the appellant's driving was not a substantial cause of the deceased's death. I agree with Mr. Bryson that the magistrate did not consider this point and in this respect misdirected himself. However, I am further of the opinion that had he directed himself properly in this matter he would have inevitably come to the conclusion that the appellant's manner of driving was a substantial cause of the deceased's death.

In the circumstances, therefore, both grounds of appeal fail and the appeal is dismissed.

Appeal dismissed.

For the appellant:
JEL Bryson
Bryson, Inamdar & Bowyer, Mombasa

For the respondent:
CK Mathenge (State Counsel, Kenya)
Attorney General, Kenya

Chokwe v Republic
[1969] 1 EA 23 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	7 June 1968
Case Number:	216/1968 (140/68)
Before:	Farrell Ag CJ and Miller J
Sourced by:	LawAfrica

[1] Criminal Law – Forgery – Alteration to excess baggage receipt by clerk – Alterations listed but no proof that the alterations made by accused – Penal Code, s. 349 (*Cap.* 63) (*K.*).

[2] Criminal Law – Theft – By servant – Excess baggage charges altered on receipt – Clerk handing over Shs. 19/- *of Shs.* 199/- *received – Penal Code, s.* 281 (*Cap.* 63) (*K.*).

Editor's Summary

The appellant was a station clerk at a counter at Nairobi Airport employed by the Airways Corporation. While on duty he duly charged a passenger with Shs. 199/- for five kilos excess baggage between Nairobi and Rome. The appellant was normally issued with blank excess baggage tickets and when a ticket was used, a copy was issued to the passenger as a receipt and the remaining four copies were handed to the cashier along with the cash collected. On the evening in question, the appellant allegedly handed over Shs. 19/- to the cashier along with the four copies of the ticket as required; but it was clearly established that the ticket had been altered. *Inter alia*, the passenger's destination had been changed from "ROM" to "ENTEBBE": the excess weight charge altered from Shs. 39/80 to Shs. 3/80; and the total payment altered from Shs. 199/- to Shs. 19/-.

Held –

(i) the magistrate was abundantly justified in finding that the appellant handed over no more than Shs. 19/- out of the Shs. 199/- which he had received from the passenger and the prosecution had no need to establish a corresponding deficiency in the assets of the Corporation;

(ii) the appellant was aware that alterations had been made to the receipt in question but he made no effort to bring these alterations to the notice of the security staff;

(iii) there was no evidence that the ticket ever passed out of the appellant's hands from the time it was completed to the time it was handed to the cashier;

(iv) there was therefore far more evidence than that of opportunity; and the magistrate was fully justified in inferring from the circumstantial evidence that the forgeries were committed by the appellant and that the purpose was to defraud or deceive.

Appeal dismissed.

No cases referred to in judgment

Judgment

The following judgment of the Court was read by **Farrell Ag CJ:** On the evening of October 23, 1967, a passenger named Goldsmith, who was in possession of a through ticket from Colombo to London, presented himself at Nairobi Airport for the stage of the journey from Nairobi to Rome. At the weighing-in counter he was found to have five kilos of excess baggage. The excess baggage rate for that stage of the journey is Shs. 39/80 per kilo, and he was duly charged Shs. 199/-. The appellant who was on duty as a station clerk at the counter, collected this sum from him and issued him with a receipt in which the excess weight was entered as five kgs., the charge as Shs. 39/80 per kilo, and the total payment as Shs. 199/-. The journey was shown as from NBO (the symbol for Nairobi) to ROM. The passenger in due course embarked on the flight on which he was booked and disembarked at Rome.

Under the procedure in force at Nairobi Airport, the appellant when he came on duty had been issued with a bundle of five blank excess baggage tickets for use as required. They were issued to him by one Khan who was also on duty as a cashier. The excess baggage tickets are printed in quintuplicate. The top copy is labelled "auditor's coupon", the second copy is sent to the airline's head-quarters and was not exhibited in this case, the third is marked "supporting coupon", the fourth, "issuing office coupon", and the fifth is marked "passenger coupon" and constitutes the passenger's receipt. It was the duty of the issuing clerk to return the unused tickets to the cashier, together with the top four copies of any used tickets and at the same time to hand over the cash received. Particulars of any used tickets together with the cash received are entered on a cash receipt extracted from a cash receipt book and handed to the cashier who signs the receipt. A carbon copy remains in the receipt book. The receipt usually contains a number of entries which may be received from different counter clerks.

In the present instance it was clearly established that the original and retained copies of the excess baggage ticket had been altered in material particulars before they were handed in by the appellant to Khan. Over the symbol ROM there had been superimposed in capital letters ENTEBBE; the excess weight charge had been altered, by deletion of a digit, from Shs. 39/80 to Shs. 3/80, which is in fact the

excess baggage rate from Nairobi to Entebbe; the total charges, which had been left blank in the original (as appears from the passenger's coupon (Exhibit 3)) had been entered as Shs. 19/-; and the total payment had been altered from Shs. 199/- to Shs. 19/-. In addition the total weight and

free allowance had been entered as twenty-five kgs., respectively; the number of the passenger's ticket had been altered; and the name of the passenger had been altered from "Goldsmith" to "Goldsmithers".

The evidence of Khan is that the appellant, when he handed in the ticket (Exhibit 1) and the copies, handed in Shs. 19/- in cash. The appellant maintained that he handed in Shs. 199/-.

An investigation was immediately set in train and in due course the appellant was charged on two counts, the first of stealing by a servant contrary to s. 281 of the Penal Code in respect of the sum of Shs. 180/-, the difference between Shs. 19/- and Shs. 199/-, and the second of forgery contrary to s. 349 of the Penal Code in respect of the three material alterations to the ticket, namely, the alteration of ROM to ENTEBBE, the alteration of the rate of charge from Shs. 39/80 to Shs. 3/80 and the alteration of the total charge from Shs. 119/- to Shs. 19/-.

The trial was held before the Senior Resident Magistrate, Nairobi, who after a detailed and careful consideration of the evidence stated his conclusions as follows:

> "I am satisfied beyond reasonable doubt that the accused did receive Shs. 199/- from Goldsmith, that he only paid over Shs. 19/- to Khan and stole the balance, and that he altered the excess baggage ticket (Exhibit 1) in the three respects alleged in the charge. That he did so with intent to deceive and defraud is an inevitable conclusion."

In the course of his examination of the evidence he commented that the appellant was a very poor witness. He gave full consideration to the evidence of the appellant's witnesses and gave cogent reasons for regarding their evidence as being of very little weight. He correctly appreciated that the prosecution case rested primarily on the evidence of Khan and after careful consideration of the evidence of this witness he concluded:

> "In my opinion Khan was an honest and reliable witness. He gave his evidence straightforwardly and well and stood up to two long cross-examinations without being shaken. He clearly did an unwise thing in accepting the wrong security officer's initials, particularly as he had himself queried the matter in the first instance, but, having considered it, I am satisfied this does not affect the veracity of his evidence which I accept."

The reference to the security officer needs explanation. The evidence showed that the appellant, after (as he admits) tampering with the total amount shown on the excess baggage ticket (for the purpose as he claims of making the figures clearer) brought the ticket to Khan, who, in accordance with the rules laid down, refused to accept the altered ticket without the signature of a security officer. The appellant was unable to find Phillip, the security officer who should have signed the ticket; but he found another security officer, Ngure, who put his initials on the ticket as they appear on Exhibit 1. According to Khan, the appellant told him that it was Phillip who had signed the ticket, and this is reflected in the entry at the foot of the page under the date October 23, 1967, in the diary (Exhibit 8). The important point in the evidence of Ngure, as the magistrate remarked, is that when he saw Exhibit 1, it was for five kilos excess baggage from Nairobi to Entebbe, and he was not challenged on this. The alteration had been made while the ticket was still in the custody of the appellant and before it had been returned to Khan.

In an attractively presented argument before this Court Mr. Makhecha for the appellant has not sought to reinstate the tarnished evidence of the appellant's witnesses, or to challenge the magistrate's finding that Khan was an essentially

honest witness; but he has submitted that the finding of forgery was dominant in the magistrate's mind and was the basis of his finding of theft; that there was no direct or sufficient evidence of forgery; that the magistrate should have considered the possibility that Khan was mistaken in thinking that he had received only Shs. 19/- when in fact he had received Shs. 199/-; and that in any case the court was not justified in its finding of theft in the absence of any evidence to show that there was a general deficiency. We shall examine each of these submissions in turn.

We do not find it necessary to examine the question whether the magistrate found that the appellant stole because he forged, or that he forged because he stole. The evidence must be regarded as a whole, and neither the evidence of forgery nor the evidence of theft can properly be regarded in strict isolation. But in any case it does not appear to us that there is any substance in the suggestion that the magistrate first concluded that the appellant was guilty of forgery before he concluded that he was guilty of theft. That is not the order in which he stated his conclusions in the passage which we have already cited. That Goldsmith paid the appellant Shs. 199/- was not disputed either in the lower court or before us. The issue on the theft charge was whether the appellant handed over Shs. 199/- to Khan as he himself claims, or only Shs. 19/- as alleged by Khan. The submission made is that Khan may have made a mistake, and in support of it, reference is made to the occasion described in the evidence of Ouma when Khan had first of all suggested that he had overpaid Ouma to the extent of Shs. 200/- and subsequently found the money in the safe. The suggested inference is that as Khan had made a mistake on that occasion there is at least a possibility that he made a mistake on this occasion, too, in claiming that the appellant had handed him only Shs. 19/- when in fact he had handed him Shs. 199/-. We can see no similarity in the circumstances of the two cases and we consider that the magistrate was fully justified in finding that the appellant paid Khan no more than Shs. 19/-. It seems to us well-nigh inconceivable that anybody could make a mistake of such magnitude in relation to the amount of money he had received. Moreover, there was one very cogent piece of evidence to which we think the Magistrate paid less attention than he might have done in reaching his conclusion. In his examination-in-chief Khan said:

> "I asked him (sc. the appellant) to enter the amount of the excess baggage ticket in the cash receipt book, which he did, Shs. 19/-, in my presence."

The book (Exhibit 6) was then produced before him, and he went on:

> "I see cash receipt No. 18434. Accused has entered in the seventh line that he had charged for five kilos for Entebbe at Shs. 3/80 per kilo. He left the coupon and Shs. 19/- with me and went away."

There was no cross-examination whatever on this part of Khan's evidence, although the appellant was represented by counsel. In his own evidence the appellant said, referring to the seventh line:

> "That is not my writing. If it had been I would have certified it by initials . . . The person who enters the receipt for cash signs it."

The last statement appears to mean that the signature at the foot of each page is that of the cashier receiving the money, and this appears to be correct. That, however, has no bearing on the question in whose handwriting the entry was made, and we have noticed that in this and in several other instances different handwritings appear on different lines of a single receipt. If that is so, it contradicts any suggestion that the entries were ordinarily made by the person who signed at the foot of the receipt. In this instance the appellant denies that the entry is in his handwriting but we consider that his denial would have been more convincing if he had not gone on to give a manifestly unsound reason

for it, since we have not found a single entry in the book against which any initials appear. We do not think it right for us to set ourselves up as handwriting experts, but having looked at the figures admittedly in the handwriting of the appellant on Exhibit 1 and Exhibit 3 and compared them with the figures "19.00" at the end of the entry in Exhibit 6, we notice that there is at any rate no marked dissimilarity between the figures in the two documents. In short, we think that if the magistrate had directed his attention more closely to the question who made the entry in Exhibit 6, we think it almost inevitable that he would have preferred the evidence of Khan, unchallenged in cross-examination, that it was made by the appellant, to the bare denial of the appellant and the unconvincing reason by which he supported it. Even if we are wrong in this and the entry was not made in the handwriting of the appellant, we find it difficult to believe that the entry was made otherwise than in the presence of the appellant (as stated by Khan) and that the appellant was unaware of it. The entry is, we need hardly point out, wholly consistent with the evidence of Khan that he received only Shs. 19/-, and inconsistent with the claim of the appellant that he handed over Shs. 199/-. If the writing is that of the appellant, no more need be said; if it was not made by him, but as Khan says, was made in his presence and he stood by and let the error pass uncorrected, the case against him is equally strong.

We consider that the magistrate was abundantly justified in his finding that the appellant handed over no more than Shs. 19/- out of the Shs. 199/- which he had received from Goldsmith. Once that is accepted, we consider that nothing more is required to establish the guilt of the appellant on the first count of theft by a servant, and we are unimpressed by the contention put forward on behalf of the appellant that the prosecution must go further and prove that a corresponding deficiency was found in the assets of the corporation. If a clerk is caught red-handed taking money from the till, his employer does not have to show that his takings at the end of the day were short by the amount found in the possession of the clerk. If the appellant whose duty it clearly was to pay over Shs. 199/- is proved only to have handed over Shs. 19/-, we do not consider any further evidence is required to prove theft of the balance.

We turn now to the count of forgery, as to which counsel for the appellant submits that there was no evidence on which the magistrate could have found the charge proved. He comments on the evidence of the document examiner who had been content merely to list the alterations to the ticket without attempting to answer the question in whose handwriting the alterations had been made. This, he submits, is not the type of evidence normally expected from a handwriting expert; and in the absence of any proof that the alterations were in the appellant's handwriting, nothing remains except evidence of opportunity, and authority was cited to show that proof of opportunity is insufficient for a conviction on a charge of forgery.

As an abstract proposition we agree that mere proof of opportunity is not enough for a conviction, but we do not agree that in this case nothing more was proved. State Counsel concedes that there was no direct evidence of forgery, but he is correct in saying that the evidence must be looked at as a whole. The appellant has admitted that he altered the ticket in one particular, by repeating the last 9 in Shs. 199/- to make it more readable. As to this claim the magistrate has commented:

> "His story that he tried to emphasise the 9 at the bottom because it was dirty and because the ink in his pen had stopped flowing is just not credible. Even though faint, the Shs. 199/- is perfectly readable even on Exhibit 3, the passenger's coupon. The accused, as I understand him, admitted the stroke now appearing between the shillings and cents was his. This runs through

> the back of the last 9 on the top copy (Exhibit 1) and through the cents on Exhibits 1A and 1B, (i.e., the third and fourth copies) and though a very clumsy attempt, the figure is certainly not now unequivocally 199/-, particularly in view of the 19/- which appears in the space for total charges. The accused stated he normally put a decimal point between the shillings and cents. Why put a stroke in this case?"

Having examined the exhibits in question, we consider the magistrate's comments were not unreasonable, and that he was fully justified in rejecting the motive assigned for the alteration which the appellant admitted he had made.

It was this alteration which led Khan to insist on the initialling of the ticket by a security officer, and this in itself must have drawn the appellant's attention to the writing on the ticket. The security officer was positive that when he put his initials on the ticket, the destination was shown as Entebbe, and this was not challenged by the defence and was accepted by the magistrate. The appellant had made out the original ticket showing the destination as Rome, and cannot have failed to notice the alteration if it had already been made; and if it had been made by somebody other than the appellant, it seems to us inconceivable that the appellant should not have drawn the attention of the security officer or of Khan to the alteration. His silence at this stage is cogent evidence from which an inference of guilt may be drawn. Finally, it may be noted that there is no evidence that the ticket ever passed out of the appellant's hands from the time it was completed until it was handed over to Khan.

Enough has been said to show that the evidence on this count was far more than mere evidence of opportunity; and even in the absence of any proof of the handwriting, in which the alteration was made, we consider that the magistrate was fully justified in inferring from the circumstantial evidence that the forgeries assigned in the particulars of the count were committed by the appellant and that the purpose was to defraud or deceive.

We are satisfied that the appellant was properly convicted on both counts, and as there is no complaint about the sentence in the event of the conviction being upheld, we dismiss the appeal.

Appeal dismissed.

For the appellant:
HP Makhecha
HP Makhecha & Co, Nairobi

For the respondent:
JB Karugu (Senior State Counsel, Kenya)
Attorney General, Kenya

Kimani v Attorney-General
[1969] 1 EA 29 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 28 October 1968

Case Number: 711/1968 (156/68)

Before: Trevelyan J

Sourced by: LawAfrica

[1] Civil Practice and Procedure – Plaint – Amendment of a trial – Whether amendment allowable at trial to claim interest.

[2] Damages – Costs – Whether plaintiff can be awarded as damages the costs of previous abortive proceedings.

[3] Tort – Land adjudication – Interference with the right of a person to be enrolled on the Adjudication Register under the Native Land Tenure Rules, 1956 (*K.*) *– Whether actionable – Whether plaintiff's conduct in challenging the action of the officials debarred him from succeeding.*

Editor's Summary

The plaintiff had his name lawfully inserted as owner of certain land in the Record of Existing Rights under the Native Land Tenure Rules, 1956. Later an Adjudication Register took the place of the Record of Existing Rights. No legal machinery ever existed for the removal of a proprietor's name from these registers, but the plaintiff's name was removed by Government officials and that of one Bari substituted. After various protests which had no satisfactory result, the plaintiff applied for an order of mandamus, which was refused as being the wrong remedy. He then brought this suit against the Attorney-General for damages (including the costs of the mandamus proceedings). Application was made during the trial to amend the plaint to claim interest.

Held –

(*a*) (i) the plaintiff had a right to have his name on the register as the owner of the land;

(ii) there had been unlawful interference with that right which had resulted in damage to the plaintiff and for which the plaintiff should have a remedy (principle in *Ashby v. White* (1) adopted);

(iii) the plaintiff's conduct had not debarred him from succeeding in the action;

(*b*) as the omission to claim interest was an oversight and did not affect the merits of the case, the application to amend and claim interest would be allowed;

(*c*) the costs of the abortive mandamus proceedings could not be awarded as damages.

Judgment for the plaintiff for Shs. 55,640/-, interest and costs.

Cases referred to in judgment:

(1) *Ashby v. White* (1703), 2 Ld. Raym. 938: 92 E.R. 126.

(2) *Donoghue v. Stevenson*, [1932] A.C. 562.

(3) *Nicholls v. Ely Beet Sugar Factory Ltd.*, [1936] Ch. 343.

(4) *K. Dann v. Hamilton*, [1939] 1 All E.R. 59.

(5) *Bollinger v. Costa Brava Wine Co. Ltd.*, [1960] 1 Ch. 262.

(6) *Hedley Byrne & Co. Ltd. v. Heller & Partners*, [1964] A.C. 465.

(7) *Rookes v. Barnard*, [1964] A.C. 1129.

Judgment

Trevelyan J: The plaintiff and a man called Bari were rival claimants to some land which was in an area covered by the Land

Consolidation scheme then being operated and, to determine the dispute between them, a committee was duly appointed under the Native Land Tenure Rules, 1956 (which then applied to the scheme) which committee in the exercise of its functions adjudged that the land belonged to the plaintiff. This determination was, as the Rules required, entered in a Record of Existing Rights as it was called, and the plaintiff's name appeared therein as being, in effect, the proprietor of the land. Later an Adjudication Register took the place of the Record. No legal machinery has ever existed to authorise the removal of a proprietor's name from either of these registers against his will, but the plaintiff's name was so removed, and Bari's name substituted therefor, as a result of which the plaintiff has been deprived of his land. How this sorry state of affairs came about or was allowed to come about I will shortly set out, but I will first mention that I shall be referring to both the Record and the Adjudication Register as the "register".

Late in 1959, Bari wrote to a member of the then Legislative Council expressing his dissatisfaction with the determination and asked for what may conveniently be called a rehearing of the dispute. The plaintiff received a letter from his Locational Committee telling him than an "impartial committee" would "attend" his case on May 5, 1960, and the hearing took place before some court elders (and before some referees as well, I think) who in some fashion had constituted themselves a court. Their decision, as recorded on a piece of paper headed "Land Consolidation Office" (which shows this office's intermeddling in the matter), was that the land was to be divided between the two contestants. The plaintiff wrote to the District Officer asking why his land had been divided, whether Bari, by the decision, had some right "in" his land, why it should be so and, "When did the Council of the District stop (sic) the case where to start?" He received a reply from a District Assistant in the Land Consolidation Office that a further appeal would not be permitted because "with the evidence available, there has been no miscarriage of justice in your case and even Superhuman could not find a better judgment". The plaintiff wrote to the Chief Secretary, and the letter having been passed on, a Land Consolidation officer decided that the case should be heard again, "in view of the two different judgments, one by the assessors and the other by the committee". On April 26, 1961, a District Arbitration Board heard certain evidence (I am not clear as to the extent of it but it does not matter) and came to the conclusion that the whole land belonged to Bari. The plaintiff wrote to the Chief Secretary and others for yet another hearing, asking, "There have been three decisions which are quite different from each other, which of these is the correct one?" but his request was turned down. He also asked a further question which I shall later set out. Late in 1962 he consulted his advocates and through them applied to this Court (Sir John Ainley, C.J.) for an order of mandamus which was refused. The refusal was not because the merits of the case may not have been with him, but because of the remedy sought. The learned Chief Justice put the matter in this way:

> "I have been troubled by this case, in which possibly an injustice has been done, and certainly the procedures laid down by Parliament have been misunderstood, and ignored. But I have been asked to give a particular remedy. That remedy I cannot give."

The plaintiff filed the instant suit for damages.

The parties have accepted as correctly representing the facts, and indeed the law, all that the learned Chief Justice had to say in his admirable judgment and I was only required to take evidence about the two rehearings, which, due to the paucity of evidence before him, he was not clear upon; and upon values.

I have, therefore, set out the facts at no greater length and can only trust that I have said enough to make what follows sufficiently clear.

The defence to the action is limited to two grounds:

(*a*) that the plaintiff never had a cause of action in law; and

(*b*) that if he ever did have such cause of action, he has, by his conduct, debarred himself from succeeding thereon.

There are five issues, the answers to which will be apparent as I reach the appropriate places in this judgment.

That the plaintiff had a cause of action is not, to me, in doubt. The argument to the contrary was based on the well known theory of Sir John Salmond that there is a law of torts but not a law of tort so that there is liability only for certain torts, but this theory is now generally rejected, and I take leave to suggest that it is at least to be doubted if it ever represented the true position. The law is a living thing and I believe that a court would be shirking its responsibility were it to say, assuming that there be no existing recognised tort covering the facts of a particular case, "Why then, this must be an end to it". It would undoubtedly be shirking its responsibilities, for instance, in this case were it to take that stand. With respect, I entirely agree with Danckwerts, J., who, in *Bollinger v. Costa Brava Wine Co. Ltd*., [1960] 1 Ch. 262, said (at p. 283):

> ". . . the law may be thought to have failed if it can offer no remedy for the deliberate act of one person which causes damage to the property of another."

The law must, of necessity, adapt itself; it cannot stay still. In *Rookes v. Barnard*, [1964] A.C. 1129, the House of Lords particularly asserted its right to adapt the common law to changing social conditions. The plaintiff's name was removed from the register without the slightest legal justification or excuse for this being done and he has lost a valuable right of property as a result. Is the court in the modern society in which we live to deny him a remedy? I believe not.

In any case the courts have recognised that unlawful interferences with pre-existing rights give a right to damages. One may readily point to the case of *Ashby v. White* (1703), 2 Ld. Raym. 938; 92 E.R. 126. In the case now before the court we have a plaintiff who was given, and had, an absolute and unchallengeable right which was flouted and invaded; no justification nor yet excuse has been proffered, even suggested. As Sir John Holt said in *Ashby v. White:*

> "If the plaintiff has a right he must of necessity have the means to vindicate it and a remedy if he is injured in the enjoyment or exercise of it: and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."

And that is as applicable to the facts of the instant case as it was to facts of the other case. His judgment begins:

> "The single question in this case is whether, if a free burgess of a corporation, who has an undoubted right to give his vote in the election of a burgess to serve in Parliament, be refused and hindered to give it by the officer, if an action on the case will lie against such officer."

In the final result the plaintiff was awarded £200 by way of damages. Again, quoting the learned Chief Justice:

> "If a man gives another a cuff on the ear though it cost him nothing, no not so much as a little diachylon, yet he shall have his action . . ."

What happened was that the returning officer maliciously refused to accept the plaintiff’s vote, the latter being a duly qualified elector, and it being recognised

that he had a pre-existing right, i.e. the right to vote, he was awarded damages for its invasion. Proof of damage was not required nor did the court look to see whether there was a falling within any existing category of tort. The facts of the case now before this court show that the plaintiff had an undoubted and absolute right to have his name on a register, i.e. the register. That right was invaded and I do not see how it can be said that he had no remedy for such invasion.

I am not unaware that the decision in *Ashby v. White* has been criticised, but it has been cited with approval by Lord Wright who in *Nicholls v. Ely Beet Sugar Factory, Ltd*., [1936] Ch. 343, a claim for the infringement of fishing rights said, at p. 350:

> "the ability to maintain such an action without proof of actual loss depends on a much wider principle, that is the principle that where you have an interference with a legal right the law presumes damage."

In the instant case, of course, the plaintiff has suffered economic loss but that is only for later consideration.

As the Government servants concerned with the operation of the Land Consolidation scheme were surely supposed to know the rules which they were administering they may have acted deliberately and maliciously with the intention unlawfully to injure the plaintiff or they were merely negligent in the way they carried their duties out (particularly so the keeper of the register, for he, above all others, should have known that the removal of the plaintiff's name from the register was not possible in the manner in which it was sought). As I understood the way the case came to me, negligence was one of the bases of the claim put forward, and if not denied, was not challenged. Certainly a "duty situation" existed between the plaintiff and the Government officers concerned. They were, as Lord Atkin would have described their relationship, "neighbours": *Donoghue v. Stevenson*, [1932] A.C. 562. That there has, in a case, been no prior recognition of a precise situation by the courts does not matter in the least. As Lord Pearce put it in *Hedley, Byrne & Co. Ltd. v. Heller & Partners Ltd*., [1964] A.C. 465 at p. 536:

> "How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the court's assessment of the demands of society for protection from the carelessness of others . . ."

Once the dispute had been decided, as it was, in favour of the plaintiff, he was entitled to be and to remain, so long as it pleased him, the registered proprietor of the land, and to him, and to him alone, did Government owe a duty of care in respect thereof, and the various officers in breach of that duty thereby caused the plaintiff to suffer loss.

Look at it how you will, the plaintiff had a cause of action sounding in damages for the undoubted wrongs done to him. Has he done anything to debar himself from recovering damages for the same? Let us go over some of the facts.

There is no question but that the May, 1960 hearing was arranged without consultation with the plaintiff or regard to his rights and wishes. He could have refused to attend or, having attended, he could have challenged the validity of the proceedings. But he did not. He is a simple tribesman who received from his Locational Committee, a body of importance to him no doubt, a notice that there were to be certain proceedings. He took them to be some sort of appeal and went along. He was not asked if he objected to the proceedings; only if he objected to any of those who were to be the judges thereat. He was aggrieved by the result and pursued the obvious course. He asked for a "third appeal". There can be no doubt that he thought the various proceedings to

be parts of a series. His request was refused for the reasons which I have quoted and with which I could not disagree more, but he was tenacious and was ultimately offered his "appeal". When, however, the time came for it to be heard, it was in the form of a rehearing. That, he did not request. He soon enough asked: "Why did the Board consider the whole land while I appealed for 36.17 acres?"

The defence contend that as the plaintiff took part in the two rehearings he "took his chance" by which I think is meant that having agreed to take part in them he is bound by the decisions given and so cannot now be heard to complain. In regard to the first rehearing the argument is that he "acquiesced" in it, whilst in the case of the second, the suggestion is that having asked for it, the doctrine of volenti non fit injuria is a complete defence to his claim. With respect I entirely disagree. It is immediately to be pointed out that the plaintiff asked for neither of the rehearings. He did not seek that which took place in 1960; that was convened as a result of Bari's efforts, and in 1961 he sought an appeal as to 36.17 acres but got a rehearing as to 64.1 acres instead. Nor am I prepared to recognise the distinction sought to be drawn between acquiescence and volenti as it was put to me. You may have a defence where there has been acquiescence in an arbitrator's award, it is true, but it is a misuse of language to say that either of the rehearings was an arbitration or that the plaintiff acquiesced in their determinations. Certainly do I think that in the sense of submitting to the rehearings, as one submits to any tribunal apparently clothed with the appropriate jurisdiction, did the plaintiff acquiesce therein, but I do not see that he has lost any of his rights by doing so. There was, of course, nothing to dispute and nothing that could be in dispute. It is argued, so far as the second of the two rehearings is concerned, that "He took his chance. He asked for it and prosecuted . . . He voluntarily took the risk of losing all." But he did not take the risk of losing all for he only asked for an appeal in respect of 36.17 acres, and he did not prosecute in the sense of starting a new set of proceedings for he took what he thought (as I think it must be) a further step in the series. He cannot be said to have consented to having his name removed from the register, he undertook to suffer no injury and he sought to adopt no risk. There was, as I think, no risk for him to adopt. His constant endeavour was to try to stop people injuring him. I need not say much about the doctrine itself. It is enough, I think, to mention that whether or not the plaintiff was volens is a question of fact, and that for the defence to succeed it must show not only that the plaintiff should have known that there was some degree of risk, but that he appreciated the full extent of it: *Dann v. Hamilton*, [1939] 1 All E.R. 59. I do not think that the facts before the Court reveal any express or implied consent on the plaintiff's part to suffer any injury in respect of his land or its registration. He has not disentitled himself from receiving damages.

I will not grant the item of damages claimed in respect of the abortive mandamus proceedings. They were dealt with in the other court and they were incurred simply because the wrong procedure was adopted. The plaintiff, as the issue asks, "increased his damages" and the defendant cannot be made to pay for it.

I shall not grant exemplary damages. They may be ordered where there have been oppressive, arbitrary or unconstitutional actions by Government servants: *Rookes v. Barnard* (above) but wrong though nearly everyone was about almost everything done, no-one, I think, intended to oppress, to be unconstitutional or to act in an arbitrary manner so far as these proceedings show, and in any event, compensation rather than punitive damages seems more appropriate in the circumstances of the case.

Both sides agree that the 1959 value of the land is the correct basis for working out the claim for its loss (though I observe that the year 1961 appears in the

plaint) and accepting, as I do, that Shs. 400/- an acre is a fair figure – I have the assessor's evidence in mind, but he has no personal knowledge about it – the resulting figure is Shs. 25,640/-. The item for "general damages" is analogous, as I believe, to an action for mesne profits, but I cannot believe it right to make an award based on the period from 1959 to date, for had the proper proceedings been instituted in 1963 an award could then have been made. But I am prepared to accept the figure of Shs. 6,500/- for annual loss of profits and I award Shs. 30,000/- under this head.

I was asked at a very late stage of the trial to allow the plaint to be amended so that interest might be claimed. It is not too late, even on appeal, to ask for pleadings to be amended and, as there was obviously an oversight and the merits of the case are not affected thereby, I will allow the application but only from this day will interest be payable. The plaint is amended accordingly.

There will be judgment for the plaintiff for Shs. 55,640/- with interest thereon at court rates from today until payment, and costs.

Judgment for the plaintiff.

For the plaintiff:
MK Bhandari
Bhandari & Bhandari, Nairobi

For the defendant:
JF Shields (Senior State Counsel, Kenya)

Kara v Osman
[1969] 1 EA 34 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	14 June 1968
Case Number:	32/1968 (162/68)
Before:	Georges CJ
Sourced by:	LawAfrica

[1] Customary Law – Mohammedan law – Whether customary law includes Mohammedan law – Magistrates' Courts Act, ss. 35, 36 *and* 57 (*T.*).

[2] Jurisdiction – District Court – Whether it has jurisdiction in civil matters under Islamic law – Magistrates' Courts Act, ss. 14, 35, 36 *and* 57 (*T.*).

[3] Matrimonial Causes – Applicable law – Whether Muslim children of Asian fathers and African mothers living as Africans are "non-Christian Asiatics" – Magistrates' Courts Act, s. 14 (1) (*a*) (i) *B – Marriage Divorce and Succession* (*Non-Christian Asiatics*) *Ordinance* (*T.*).

[4] Mohammedan Law – Customary law – Whether included in the term "Customary law" – Magistrates' Courts Act, ss. 35, 36 *and* 57 (*T.*).

Editor's Summary

The applicant and the respondent were Muslims and children of Asian fathers and African mothers, and had always lived as Africans. The respondent, who had been divorced by the applicant by "talak", sued in a District Court for custody of the children of the marriage and for their maintenance, on an agreement signed by the applicant at the time of the divorce. After various proceedings the applicant applied to the High Court for an order under s. 42 of the Magistrates' Courts Act 1963, that the matter be not transferred to a Primary Court but that it proceed in the District Court.

Held –

(i) neither of the parties was a non-Christian Asiatic;

(ii) the term "customary law" does not include "Islamic law"; and therefore a Primary Court has jurisdiction in civil claims under Islamic law;

(iii) the jurisdiction of the Primary Court is not exclusive and therefore the District Court has concurrent jurisdiction with the Primary Court.

Application allowed. Case remitted to District Court.

No cases referred to in judgment

Judgment

Georges CJ: The question for decision in this case is the jurisdiction of a District Court to entertain an application by a divorced Muslim wife for custody of the children of the marriage and for their maintenance. The plaint was based on an agreement signed by the husband at the time of his giving the talak.

At the hearing before the Resident Magistrate, the husband argued that the Court had no jurisdiction to hear the matter. The learned magistrate ruled that he had jurisdiction. He held that:

> "maintenance agreements are perfectly lawful, and as long as there is valuable consideration plus intention of parties to create legal maintenance, courts of law will enforce them."

He also held that the suit was:

> "based on ordinary contract law. This law is written, Ref. Cap. 433, so that it falls within the ambit of s. 35 (1) (*b*) of the Magistrates' Courts Act, 1963 (Cap. 537)."

The case continued, and while the husband-respondent was testifying, difficulties developed between the trial magistrate and himself. As a result, the matter was adjourned. Later, it came before the Senior Resident Magistrate. He ruled that Islamic law applied in the matter and that the Primary Court was the proper forum in which the case should proceed. He felt that since the District Court had no original jurisdiction in the matter, and in view of what had passed between the respondent and the trial magistrate, the case should be sent to the High Court, so that an order could be made transferring it to the appropriate Primary Court. Thereupon, the applicant filed this application under s. 42 of the Magistrates' Courts Act asking that the matter be not transferred but that it should proceed in the District Court.

Before me, it has been urged that the parties are non-Christian Asiatics, and that accordingly the Primary Court would have no jurisdiction to hear and determine the matter. The husband is described in the Marriage Certificate as "Patan" and the wife as "Katayawari", both Indian peoples. In fact, they are the children of Asian fathers and African mothers. The husband assures me that they have always lived as Africans, and this Mr. Jadeja does not seriously dispute. I would hold that neither party is a non-Christian Asiatic, and that proviso (B) to s. 14 (1) (*a*) (i) does not apply.

[*This reads*: "14 (1) A primary court shall have and exercise jurisdiction –

(*a*) in all proceedings of a civil nature –

(i) where the law applicable is customary or Islamic law:

Provided that no primary court shall have jurisdiction in any proceedings –

(A)

(B) in which Islamic law is applicable by virtue of the provisions of the Marriage, Divorce and succession (Non-Christian Asiatics) Ordinance;"]

The problem is whether or not a District Court has jurisdiction at all to hear the matter.

Section 57 of the Magistrates' Courts Act provides:

> "57. (1) Subject to the provisions of any law for the time being in force, where jurisdiction in respect of the same proceedings is conferred on different courts, each court shall have a concurrent jurisdiction therein.
>
> Provided that no civil proceedings in respect of marriage, guardianship or inheritance under customary law, or the incidents thereof, and no civil proceedings in respect of immovable property, other than proceedings relating to land held for a Government lease or a right of occupancy granted under the Land Ordinance, shall be commenced in any court other than a primary court unless the Republic or the President is a party thereto or unless the High Court gives leave for such proceedings to be commenced in some other court.
>
> (2) Nothing in s. 15 of the Civil Procedure Code shall require any proceedings of a civil nature to be commenced in a primary court."

It would appear, therefore, that if the suit in question was based on customary law, this application could not succeed, since clearly prior leave of the High Court would have had to be sought to enable the proceedings to be commenced in some court other than the Primary Court.

Mr. Jadeja points out, however, that the word "Islamic" does not occur in that section and that civil suits to be decided under Islamic law do not fall within its scope. He points out that s. 14, which sets out the jurisdiction of the Primary Court, states that it extends to all proceedings of a civil nature "where the law applicable is customary or Islamic law".

I think the argument is sound. The term "customary law" cannot be taken to include Islamic law, and thus s. 57 is not applicable to the instant case.

Clearly, the Primary Court would have jurisdiction in this case – but not exclusive jurisdiction; and since jurisdiction has not been exclusively conferred on any other court, the District Court would have jurisdiction by virtue of ss. 36 and 35 (2) of the Act, which read as follows:

> "36. A court of a resident magistrate shall have and exercise jurisdiction in all proceedings in respect of which jurisdiction is conferred by any law for the time being in force –
>
> (*a*) on a court of a resident magistrate; or
>
> (*b*) on a district court, or on a district court held by a resident magistrate or a civil magistrate, in the exercise of its original jurisdiction."
>
> "35. (1) . . .
>
> (2) A district court when held by a civil magistrate shall, in addition to the jurisdiction set out in sub-s. (1), have and exercise original jurisdiction in proceedings of a civil nature, other than any such proceedings in respect of which jurisdiction is conferred by written law exclusively on some other court or courts, but (subject to any express exception in any other law) such jurisdiction shall be limited –
>
> (*a*) in proceedings for the recovery of possession of immovable property, to proceedings in which the value of the property does not exceed two hundred thousand shillings; and
>
> (*b*) in other proceedings where the subject matter is capable of being estimated at a money value, to proceedings in which the value of the subject matter does not exceed twenty thousand shillings."

It should be mentioned that s. 13 of the Civil Procedure Code, 1966, prescribes that:

> "Every suit shall be instituted in the court of the lowest grade competent to try it."

This was formerly s. 15 of the Indian Civil Procedure Code which was applicable here prior to the enactment of our own Code. Section 57 of the Magistrates' Courts Act specifically provides that nothing in that section (s. 15 of the Code) shall require any proceedings of a civil nature to be commenced in the Primary Court. It would appear, therefore, that once a District Court has jurisdiction and prior permission is not required under s. 57, a party can file an action in the District Court if he so chooses, even though the Primary Court would also have had jurisdiction to hear the matter.

It would have saved a great deal of time if the matter could be remitted for completion to the trial magistrate who began the hearing. In view of the difficulties which have arisen, however, justice may more obviously be seen to be done if the matter were dealt with by another magistrate – despite the inevitable delay which must result.

Accordingly, it is ordered that the action be remitted to the Dar-es-Salaam District Court for hearing by a Resident Magistrate other than the magistrate who originally commenced it.

The respondent will pay the costs of this application.

Application allowed.
Case remitted for hearing accordingly.

For the applicant:
S Jadeja
SJ Jadeja & Co, Dar-es-Salaam

The respondent appeared in person.

Sabayaga Farmers' Co-Operative Society Ltd v Mwita
[1969] 1 EA 38 (HCT)

Division:	High Court of Tanzania at Mwanza
Date of judgment:	6 June 1968
Case Number:	172/1967 (163/68)
Before:	Seaton J
Sourced by:	LawAfrica

[1] Appeal – To High Court – Appellant absent and unrepresented – Appellant acting on mistaken notice given to him by the Court – Whether Court will dismiss appeal – Civil Procedure Code 1966, O. 39, r. 17 (*T.*).

[2] Civil Practice and Procedure – Pleading – Striking out – Time for application – Civil Procedure

Code O. 6, *r.* 16 (*T.*).

[3] Civil Practice and Procedure – Pleading – General denial – Whether constituted by defence – Civil Procedure Code 1966, *O.* 8, *rr.* 3, 4 *and* 5 (*T.*).

[4] Civil Practice and Procedure – Pleading – Defect curable – Whether amendment should be allowed in place of striking out – Civil Procedure Code 1966, *O.* 6, *r.* 16 (*T.*).

Editor's Summary

The appellant was served with a notice from the District Registrar of the High Court under r. 13 of the Civil Procedure (Appeals in Proceedings originating in Primary Courts) Rules 1963, advising him that he might appear or might submit a statement of his arguments in writing. He did this, the statement was served on the respondent and the appellant did not appear at the hearing. Since the appeal had not originated in a Primary Court the notice served on the respondent had no basis in law. The respondent applied for the dismissal of the appeal under O. 39, r. 17 of the Civil Procedure Code 1966 on the ground of the appellant's absence. The appellant had filed a defence which it was alleged was a general denial. On the application of the respondent at the hearing, the magistrate struck out the defence under O. 6, r. 16 of the Civil Procedure Code 1966. He then heard the respondent *ex parte* and gave judgment for him. The appellant appealed.

Held –

(i) as the Court's power under O. 39, r. 17 was discretionary, and since the appellant had acted on the notice given to him, the appeal would be heard on its merits;

(ii) the application to strike out a pleading should be made promptly, and as a rule, before the close of the pleadings;

(iii) the defence was insufficient as a general denial;

(iv) the defect in the defence was curable by amendment and the magistrate therefore erred in striking it out.

Appeal allowed.

Cases referred to in judgment:

(1) *The Bank of India Ltd. v. Manibhai M. Patel, Ltd.*, [1965] E.A. 638.

(2) *Haji Ibrahim Haji Adam v. Ismail Dilmirkhan*, [1938] 1 T.L.R. (R) 585.

Judgment

Seaton J: When this appeal came on for hearing, as the appellant was absent and unrepresented, Advocate for the respondent urged that the appeal be dismissed under O. 39, r. 17 of the Civil Procedure Code 1966 (hereinafter referred to as "the Code") which rule gives the Court a discretionary power of dismissal for appellant's default. It seems that over

two months ago the appellant was given notice of hearing of this appeal by a letter from the District Registrar of this Court which advised him that he might appear by himself, his pleaders or someone duly authorised, or he might submit a statement of his arguments in writing. This notice was in accordance with r. 13 of the Civil Procedure (Appeals in Proceedings originating in Primary Courts) Rules 1963, G.N. No. 312 of 1964, which states as follows:

> 13.(1) "An appellant may embody in his petition of appeal a statement that he does not intend to appear personally or by agent at the hearing, together with a statement in writing of his arguments in support of the appeal. In such event and unless the court, associate or registrar has expressly required the appearance of the appellant, the court shall not dismiss the appeal for want of appearance and the appellate court shall have regard to such arguments.
>
> (2) Subject to the provisions of sub-r. (1) of this rule, where on the day fixed for hearing the appeal or any day to which it may be adjourned, the appellant does not appear in person or by agent, the appellate court may dismiss the appeal."

It seems clear from the above quotation that r. 13 of Government Notice 312 of 1964 concerns appeals from proceedings originating in Primary Courts. In the event of a written statement of arguments being submitted, the Court has no discretionary power of dismissal for non-appearance of the appellant at the hearing of such appeals. In the present appeal, the appellant's written statement of arguments had been submitted five days before the hearing and copies were served upon the respondent. However, the proceedings did not commence in a Primary Court but in the Resident Magistrate's Court, Musoma. The notice to the appellant therefore had no basis in law. But as the appellant has apparently acted upon the notice in ignorance of its invalidity, I declined to dismiss the appeal for default of appearance and it has been decided on its merits.

The suit before the Resident Magistrate's Court was for Shs. 715/- being the market or reasonable value of thirteen bags of maize at Shs. 55/- per bag, the property of the plaintiff/respondent. It was alleged that the maize was unlawfully removed by the defendant/appellant and/or his agent and/or servant from the plaintiff's/respondent's premises at Ngoreme, Musoma District. Alternatively the claim was in respect of the said thirteen bags of maize which the defendant/appellant had removed to their store suspecting the plaintiff/respondent to have bought them unlawfully, and which in spite of the request of the Police to return these bags to the plaintiff/respondent, the defendant/appellant had refused or ignored to do the same.

[His lordship dealt with another matter and continued:] A written statement of defence was filed on December 24, 1966, by Mr. Maheri on behalf of the defendant/appellant. It consisted of two paragraphs as follows:

> "*Statement of Defence*
>
> 1. That on behalf of the Society, I strongly deny any indebtedness to the Plaintiff in the sum of Shs. 715/-.
>
> 2. That I put the plaintiff to strict proof of his claim."

On June 30, 1967, when the case came on for hearing, on the application of the plaintiff/respondent, the learned Resident Magistrate ordered the written statement of defence to be struck out under O. 6, r. 16 of the Code as he considered that the statement filed on behalf of the defendant company was a general denial and therefore insufficient under O. 8, rr. 3, 4 and 5. Evidence was given by the plaintiff as to his claim *ex parte*, after which judgment was given for the amount claimed plus costs.

In the memorandum of appeal, which Mr. Moheri has submitted on behalf of that society, a number of legal arguments have been urged against the judgment of the learned Resident Magistrate and, in para. 5, there is set out a denial of the claim. That denial states as follows:

> "5. That the defendant (appellant) denies having removed unlawfully thirteen bags of maize from the plaintiff's premises at Ngoremi. Also the defendant (appellant) denies his indebtedness to the plaintiff in respect of thirteen bags of maize or Shs. 715/-."

What the Court has to decide in this appeal is whether the written statement of defence was bad and, if so, whether the learned Resident Magistrate erred in ordering it to be struck out and giving judgment for the plaintiff/respondent upon *ex parte* proof.

Under O. 6, r. 6 of the Code, the Court has a discretionary power to order to be struck out or amended matters in pleadings "which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit".

The wording of this rule is in all essential respects similar to that of O. 6, r. 17 of the Uganda Civil Procedure Rules, which was considered by the High Court of Uganda in *The Bank of India, Ltd. v. Manibhai M. Patel, Ltd.*, [1965] E.A. 638. In that case, Jones, J. rejected a defence contention that the whole matter of striking out pleadings was dealt with in O. 6, r. 17 and invoked the inherent powers of the Court to strike out certain paragraphs of the pleadings which raised matters that were res judicata.

Mulla, in his commentary on the Indian Code of Civil Procedure of 1908 (10th Edn.), p. 543, comments that a pleading is embarrassing if it is so drawn that it is not clear what case the opposite party has to meet at the trial. However, it is added that the power of the Court under this rule should be exercised with great care and caution and (at p. 544) that:

> "Where the defect can be remedied by amendment, the Court may give leave to amend. Where a pleading is not so specific as it ought to be, the Court may direct the party to amend his pleading or give further particulars."

The application to strike out a pleading under this rule should be made with reasonable promptitude, and as a rule before the close of the pleadings.

The vice or defect of the written statement of defence, according to the judgment of the learned Resident Magistrate was that it was "no less and no more than a general denial which is insufficient". It may be that this was a correct ruling under O. 8, r. 3 of the Code. But was this vice or defect curable by amendment, or did it follow that the whole written statement should be struck out? In this connection, it is to be observed that the application to strike out was not made until the case came on for hearing, some six months after the written statement had been filed.

In support of the course of action pursued by the learned Resident Magistrate, the advocate for the respondent cited *Haji Ibrahim Haji Adam v. Ismail Dilmirkhan* (1938), 1 T.L.R. (R) 585. In that case, no written statement was filed within the period allowed, but on the date fixed for hearing, "a written statement of a somewhat sketchy nature" was presented, no order for extending the time for filing defence apparently having been made. After hearing the reasons for failing to file the defence in time, the court allowed *ex parte* proof and gave judgment for the plaintiff as prayed. It was held by Wilson, J. on appeal, that the trial court had a discretion under O. 8, r. 10 of the Indian Civil Procedure Code of 1908 (which is similar to O. 8, r. 14 of the Code) to ignore the alleged

written statement, and to give judgment for the plaintiff after hearing his evidence without allowing the defendant to cross-examine or adduce evidence in rebuttal.

It would seem that in the present case, the learned Resident Magistrate after ordering the written statement to be struck out, acted under O. 8, r. 14 (2) (*a*), which deals with failure to present a written statement of defence within the time fixed by the Court, where the claim is for a liquidated sum not exceeding Shs. 1,000/-. Advocate for the respondent has invited this Court to hold that the position where an evasive written statement of defence has been filed is the same as if none at all has been filed, and hence the learned Resident Magistrate was justified in following the procedure authorised in the case of *Haji Ibrahim Haji Adam* cited above.

There is a certain attractiveness in this argument and if the appellant had his pleadings drafted by an Advocate or been himself a person of sophistication and legal experience, it would have had more. However, it is asserted in the written statement of arguments in support of appeal – and it has not been challenged by the respondent – that Mr. Maheri, who filed the defence, "was educated up to Standard VI some time in 1945 and he has never appeared in any court to defend any suit. Hence he has got no experience or idea in preparing written statement of defence."

In the circumstances of this case, I cannot see that injustice would have been done to the plaintiff/respondent had the learned Resident Magistrate ordered the written statement of defence amended instead of being struck out. That its defect was capable of being cured by amendment seems to be shown by para. 5 of the memorandum of appeal which, had it been substituted for the first paragraph of the written statement of defence, would probably not have been open to objection under O. 8, rr. 3, 4 or 5.

For the reasons set out above, I am of the opinion that although the written statement of defence was insufficient, the learned Resident Magistrate erred in ordering it to be struck out and judgment to be given for the plaintiff upon *ex parte* proof. The appeal is allowed. The *ex parte* judgment is set aside. The case is remanded to the Court of the Resident Magistrate, Musoma, with direction to re-admit the suit and proceed to determine it after the defendant/appellant has been given time for filing an amended written statement of defence. The appellant will have the costs of this appeal.

Appeal allowed.

The appellant did not appear and was not represented.

For the respondent:
DN Parekh
DN Parekh, Mwanza

Champion Motor Spares Ltd v Phadke and others
[1969] 1 EA 42 (CAK)

Division: Court of Appeal at Kampala

Date of judgment: 14 November 1968

Case Number:	23/1968 **(**166/68)
Before:	Sir Clement de Lestang Ag P, Duffus Ag V-P and Spry JA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda – Russell, J

[1] Advocate – Negligence – Basis for liability.

[2] Advocate – Negligence – Whether ignorance of statute constantly being invoked constitutes negligence.

[3] Civil Practice and Procedure – Third party procedure – Whether claim for compensation lies against employer of deceased based on negligence of deceased.

[4] Fatal Accident – Death of employee – Whether cause of action survives against employer of negligent deceased – Law Reform (*Miscellaneous Provisions*) *Act, s.* 7 (*U.*).

Editor's Summary

The respondents were a firm of advocates, who had represented the appellant company in previous litigation arising out of a motor accident in which an employee of the appellant had been killed. In the suit in which the widow of the appellant's employee sued the other driver, a third party notice was served on the appellant claiming contribution or indemnity in respect of the claim. On the hearing of the application for directions, the respondents appeared for the appellant and consented to an order for the filing of a statement of claim and defence. The case was consolidated with three others on the issue of liability, and the preliminary decree was appealed to the Court of Appeal. After the assessment of damages the appellant was ordered to pay a proportion of the damages awarded to its employee's widow and children. On appeal, the Court of Appeal held by a majority that the third party proceedings were misconceived as no claim lay against the employer of a deceased driver in these circumstances. The appellant sued the respondents for damages for negligence and, having failed in the High Court, brought this appeal.

Held –

(i) the widow had no cause of action against her husband's employers, since under s. 7 of the Law Reform (Miscellaneous Provisions) Act (Cap 74) if death had not intervened the person injured would have had to be entitled to maintain an action; and the deceased could not have maintained an action against his employers for an accident for which he was partly responsible and in respect of which no negligence on the part of his employers was alleged;

(ii) the respondents were therefore at fault in not advising the appellant to resist the third party proceedings from the start; and this failure directly caused loss to the appellant;

(iii) an advocate is not liable for any reasonable error of judgment or for ignorance of some obscure point of law, but is liable for an act of gross negligence or ignorance of elementary matters of law constantly arising in practice;

(iv) since the Law Reform (Miscellaneous Provisions) Act is constantly being invoked and cases arising out of motor vehicle accidents are frequent, this was not an obscure matter of law, nor was

it difficult;

(v) the respondents' fault constituted negligence and they were therefore liable to the appellant.

Appeal allowed.

Cases referred to in judgment:

(1) *Godefroy v. Dalton* (1830), 6 Bing. 460; 130 E.R. 1357.

(2) *Purves v. Landell* (1845), 12 Cl. & Fin. 91; 8 E.R. 1332.

(3) *Stephens & Co. v. Allen* (1918), 7 E.A.L.R. 197.

(4) *Barry v. Keharchand* (1919), 8 E.A.L.R. 102.

(5) *Stephens & Co. v. Allen* (1921), 8 E.A.L.R. 211.

(6) *Fletcher & Son v. Jubb Booth & Helliwell*, [1920] 1 K.B. 275.

(7) *Pentecost v. London District Auditor*, [1951] 2 All E.R. 330.

(8) *Drinkwater v. Kimber*, [1952] 2 Q.B. 281.

(9) *Champion Motor Spares Ltd. v. Barclays Bank D.C.O. and Another*, [1964] E.A. 385.

(10) *Rondel v. Worsley*, [1967] 3 All E.R. 993.

[**Editorial Note**: The final decree of the High Court of Uganda was reported in *Patel v. Barclays Bank D.C.O. and Another*, [1963] E.A. 554; and the appeal to the Court of Appeal was reported in *Champion Motor Spares Ltd. v. Barclays Bank D.C.O. and Another*, [1964] E.A. 385.]

November 14, 1968. The following considered judgments were read:

Judgment

Spry JA: In 1961, a Mr. Patel, who was employed by the appellant company, was killed in a collision between two motor vehicles. Mr. Patel was then driving a vehicle belonging to the appellant company: the other vehicle was owned by Barclays Bank D.C.O. and was being driven by a Mr. de Souza.

Mrs. Patel, the widow of the deceased, instituted proceedings against the Bank and Mr. de Souza, on her own behalf and on behalf of her infant children, to recover damages. The Bank and Mr. de Souza entered appearances and subsequently applied for leave to issue a third party notice claiming contribution or indemnity against the appellant company. The respondents, who are partners in a firm of advocates, were instructed to represent the appellant company and on its behalf entered an appearance. The usual application was made for directions, when the respondents appeared for the appellant company and consented to an order for the filing of a statement of claim and defence. This was done, the defence being an allegation that the accident was solely due to the negligence of Mr. de Souza and including a prayer that the claim to contribution be dismissed or allowed only in part. The suit was consolidated with three other suits for the purpose of deciding the issue of negligence and this resulted in a finding that Mr. Patel was sixty per cent. to blame and Mr. de Souza forty per cent. A preliminary decree was issued and an appeal against it was dismissed. The suit was then heard on the quantum of damages, which was fixed at £8,625. The learned judge reduced this to £3,450, in view of the finding that Mr. Patel had been sixty per cent. to blame, and then directed that the defendants, that is, the Bank and Mr. de Souza, were entitled to contribution from the appellant company to the extent of sixty per cent. of such sum of £3,450. The appellant company was ordered to pay sixty per cent. of the costs of Mrs. Patel, the Bank and Mr. de Souza. At no stage in these proceedings was any objection taken by the respondents to the joining of the

appellant company as a third party. Subsequently, a final decree was settled by the court and an appeal against it was dismissed. All these facts are admitted.

The appellant company, represented by other advocates, then instituted proceedings in the High Court against the respondents, claiming special damages for professional negligence, or, in the alternative, for breach of contractual duty,

interest and costs. The suit was dismissed and it is against that decision that the present appeal is brought.

The learned trial judge based his decision on the proposition that the question whether third party proceedings were appropriate in the circumstances of the case was a novel point and one of some difficulty and on the fact that although the matter had come before the High Court on a number of occasions and before this Court on the Appeal from the preliminary decree, the aptness of the proceedings was never questioned, while even on the appeal from the final decree, it was only by a majority that they were held to have been misconceived. The learned judge held that in these circumstances, the respondents had erred, if at all, in good company and could not be liable in negligence.

Counsel for the appellant company based his argument on two propositions: first, that it was clear law that the appellant was not liable to be joined as a third party, since under the Law Reform (Miscellaneous Provisions) Act (Cap. 74) it was not liable to contribution; and, secondly, that this was a matter with which advocates ought to have been familiar, or, if not, with which they should have familiarized themselves and that their failure to advise their client to resist the third party proceedings amounted to professional negligence.

Counsel for the respondents took issue on both these points: he submitted that the third party procedure was not inappropriate but that even if it were, the point was a difficult one and that a mistake on it would not show that decree of negligence which would give rise to a right to damages.

In these circumstances, the first question that must be determined is whether the third party proceedings were misconceived, because if counsel for the respondents were correct in his contention, that would dispose of the matter.

In the appeal against the final decree (*Champion Motor Spares Ltd. v. Barclays Bank D.C.O.*, [1964] E.A. 385), the majority of the Court were of the opinion that the third party proceedings were misconceived, but those opinions were obiter dicta. The reason for the opinion was given by Sir Trevor Gould, V.-P., as follows:

> "There is no basis in law (or any other basis) in an action turning on the negligent driving of Patel . . . or the second defendant or of both, and brought by the dependants of the deceased, for saying that the third party, as the employer of the deceased, was liable to pay the whole or any part of the damages ordered to be paid by the second defendant and the Bank by reason of the negligent driving of the second defendant. The third party was not a joint tortfeasor with the Bank and the second defendant in relation to such a claim, which is the only basis upon which it could have been ordered to contribute towards the discharge of their liability."

Counsel for the respondents' argument, if I have understood it correctly, was that Mrs. Patel could have sued her late husband's employers, that is the appellant company, and therefore that the appellant company was, in the words of s. 14 (1) (*c*) of the Law Reform (Miscellaneous Provisions) Act, "liable, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise". He conceded that Mrs. Patel could not have sued her husband but he submitted that the fiction of husband and wife being one ceases on death. He conceded also that Mr. Patel could have had no right of action against his employer based on his own negligence, but he claimed that Mrs. Patel did not step into her late husband's shoes but had a distinct cause of action in her own right. Thirdly, he argued that Mrs. Patel was not merely suing for herself but also for the infant children and that this gave her a different capacity. For these reasons he submitted that Mrs. Patel could sue her late husband's

employers in respect of damage arising out of his negligence when driving in the course of his employment.

I think, with respect, that there is a flaw in this otherwise attractive argument. Any action in tort which Mrs. Patel might have brought against her late husband's employer in respect of his death could only have been under Part II of the Law Reform (Miscellaneous Provisions) Act and under the provisions of s. 7, such an action is only maintainable if the act, neglect or default of the defendant

> "is such as would, if death had not ensued, have entitled the person injured thereby to maintain an action and recover damages in respect thereof".

It is quite obvious that had Mr. Patel survived, he could not have brought an action in tort for damages against the appellant company in respect of an accident for which his own negligence was partly responsible and for which no negligence on the part of the appellant company itself was alleged. Therefore, the condition in s. 7 was not satisfied and no action could have been brought under it. It was not suggested that there was any other basis on which a cause of action could have been established. If Mrs. Patel could not have sued the appellant company, the Bank and Mr. de Souza could not have looked to the appellant company for contribution, because, under s. 14 (1) (*c*) of the Act, one tortfeasor can only recover contribution from another tortfeasor if the latter "is, or would if sued have been, liable in respect of the same damage". Finally, to complete the sequence, if the Bank and Mr. de Souza could not look to the appellant company for contribution, they were not entitled to issue a third party notice under O. 1, r. 14, of the Civil Procedure Rules.

There is, therefore, in my mind, no doubt whatever that the respondents were at fault in not advising their client to resist the third party procedure from the start. Moreover, it is quite clear that the conduct of the defence directly resulted in loss to the appellant company, because, subject to the issue of negligence, it was tantamount to an admission of liability. The only remaining question, therefore, is whether it was so negligent as to render the respondents liable in damages.

On an advocate's liability for negligence, the English cases are not, I think, of great assistance, because the law in England relating to barristers is different from that relating to solicitors, while in East Africa we have a unified profession. In regard to negligence, as in all other matters, I think all advocates must be treated alike. It is clear from s. 72 of the Advocates Act (Cap. 258), that advocates in Uganda may be liable for negligence and cannot divest themselves of that liability, and it would seem, from *Barry v. Keharchand* (1919), 8 E.A.L.R. 102, that that liability extends to instituting proceedings on the instructions of a client, without informing the client that those proceedings were bound to fail. That seems to me analogous to the present position, where the respondents were, in the words of the plaint "instructed by the Plaintiff . . . to defend the Plaintiff and to take all steps necessary to protect the Plaintiff's interests in the said suit" and where they failed to advise their client that the third party proceedings could and should be resisted.

It is probable that the failure of the respondents to adopt this course was, at least in part, due to the fact that there were three other suits arising out of the same accident, where the third party procedure was appropriate. While that might explain, it cannot, I think, excuse the mistake.

It was, I think, agreed by counsel, and I would agree, that an advocate cannot be liable for any reasonable error of judgment or for ignorance of some obscure point of law. He may, however, be liable for an act of gross negligence or

ignorance of elementary matters of law constantly arising in practice. It is impossible to draw any precise line: ultimately, every case will be one of degree.

Counsel for the appellant stressed that the Law Reform (Miscellaneous Provisions) Act is a statute which is constantly being invoked and it is within our knowledge that cases arising out of motor vehicle accidents occupy a substantial part of the time of the courts. It cannot, therefore, be argued on behalf of the respondents that this was an obscure matter of law.

Counsel for the respondents argued that even if the third party procedure were inappropriate, the point was novel and difficult. Counsel for the Bank had thought it appropriate, and he had been led by Queen's Counsel. The suit had repeatedly been before the High Court and had gone on appeal to this Court, without anyone raising the question. Even when it was ultimately raised in the appeal from the final decree, it was only by a majority that this Court held that the third party proceedings were misconceived, the late learned President dissenting.

There was, of course, no duty on the High Court to question the appropriateness of the proceedings (the question not being one of jurisdiction) and, although the Court might have interfered, it is understandable that it did not, when the order for directions was by consent. Again, there was no reason for this Court to consider the matter on the appeal from the preliminary decree, since the argument was apparently limited to the issue of negligence.

Finally, counsel for the appellant submitted that the respondents neither pleaded nor gave evidence that they had applied their minds to the question and that the decision not to resist the third party proceedings was a considered, if mistaken, opinion. Indeed, I do not think they could have done so, because even if it be conceded, in view of the late President's opinion, that the matter was open to doubt, there could not, in my view, have been any doubt in the mind of an advocate who considered it, that there was at least a strong case to be argued, and one which would not have involved any substantial additional costs and which went right to the heart of the question of liability. I cannot think that this was an error of judgment; I think it must have been an oversight.

In my opinion, the respondents were guilty of negligence of such a degree as to make them liable in damages. I am satisfied that the appellant company suffered loss as the direct result of that negligence. I would therefore allow the appeal. The amount claimed as damages was not disputed in the High Court. I would therefore set aside the judgment and decree of the High Court and substitute an order awarding the appellant company damages of Shs. 69,616/71, interest at six per cent. from the date of suit and costs in the High Court. I would also award the appellant company its costs of the appeal, with a certificate for two counsel.

Duffus Ag V-P: This is a claim by the appellant company against a firm of advocates practising in Kampala for damages for negligence or alternatively for a breach of a contractual duty.

The facts are not in dispute. The appellant company employed a Mr. Arvindbai Raojibhai Patel (hereinafter referred to as "the deceased") who whilst lawfully driving the appellant's motor vehicle collided with another motor vehicle owned by Barclays Bank D.C.O. and driven by a Mr. de Souza, a Bank employee: the deceased was killed instantaneously. His widow brought an action against the Bank and its employee, Mr. de Souza, claiming damages resulting from the death of the deceased. The Bank and Mr. de Souza then filed an *ex parte* application under O. 1, r. 14 of the Civil Procedure Rules claiming to be entitled to a contribution from the appellant company in respect of any damages or costs that may be awarded against them. The application was granted and the appellant company then

instructed the respondent firm

to defend the company and to take all necessary steps to protect its interest in the suit. The respondent firm then duly entered an appearance and in due course filed a defence and from time to time appeared in court on behalf of the appellant company. The defence as filed and conducted in court was that the appellant company was not liable as the accident had been caused by the negligence of the Bank's driver, Mr. de Souza, and that the deceased was not negligent. The respondent firm never made on the appellant company's behalf any objection to the third party proceedings and never raised the point that the appellant company were under no liability in law to the family of the deceased.

After rather prolonged proceedings including two appeals to this Court the hearing was concluded and the appellant company were ordered to pay sixty per cent. of the damages awarded to the widow against the Bank and de Souza.

The appellant company claims that it was under absolutely no liability in law to pay this amount or any amount to the widow arising out of the death of her husband, the deceased, and further that the third party proceedings in her suit were never maintainable against the appellant company. The appellant company further avers that the fact that judgment was entered against them was due to the negligence of the respondent firm and it claims damages amounting to Shs. 69,616/71, the amount expended as a result of these proceedings.

The main issue at the trial of the case and on this appeal was whether or not the respondent firm were negligent and as such liable for any damages to the appellant company. It was agreed that in the event of liability being proved that the damages would be Shs. 69,616/71 as claimed.

The enrolment and practice of advocates in Uganda is governed by Statute: the Advocates Act, Cap. 258. The Act provides, *inter alia*, for the qualification, admission, discipline and remuneration of advocates and also prevents unqualified persons from practising as an advocate.

There is no specific provision in the Advocates Act setting out the standard of duty required by an advocate in the discharge of his professional duties but the Act does recognize that an advocate may be liable to his client for negligence. I refer to the provisions of s. 72 which reads as follows:

> "72. Any provision in any agreement between an advocate and a client that the advocate shall not be liable for negligence, or that he shall be relieved from any responsibility to which he would otherwise be subject as such advocate, shall be wholly void."

The extent of an advocate's liability to his client for negligence has been considered at various times by this Court. I would refer to the case of *Stephens & Co. v. Allen* (1918), 7 E.A.L.R. 197. This case went to the Privy Council (1921), 8 E.A.L.R. 211. The following extract from the judgment of the Privy Council is of some assistance:

> "The question of negligence with regard to the performance of a solicitor's duty must to some extent be affected by the local conditions and the local circumstances, as to which their Lordships might not be perfectly informed. In the present case the negligence is alleged to be due to the ignorance of the provisions of an Act of Parliament. It may well be that in Nairobi this Act of Parliament has practically never been heard of in judicial proceedings; it is impossible for their Lordships to know; but the question as to whether a solicitor is negligent or not in omitting to give effect to a statutory provision cannot be disentangled from the consideration of whether the statute that is involved is one which is of constant and common occurrence in practice or whether it is one unfamiliar and remote. With those circumstances their Lordships are unable to deal."

Russell J: in his judgment on appeal considered this question very fully and with respect has, in my view, correctly set out the degree of care required by an advocate practising in Uganda. He quoted from the following passage from the judgment of Lord Denning, in the recent English decision of *Rondel v. Worsley*, [1967] 3 All E.R. 993:

> " 'Finally it must be remembered that counsel is not liable in negligence merely because he expresses an opinion which ultimately turns out to be wrong nor merely because he overlooks one of a number of relevant authorities. Further, in spite of the expression of Lynskey, J., in *Pentecost v. London District Auditor*, [1951] 2 All E.R. 330 that so far as civil proceedings are concerned gross negligence is not known to the English Common Law, I remain of the opinion that counsel will only be guilty of crassa negligentia or gross negligence by some really elementary blunder, see *Purves v. Landell* (1845), 12 Cl. & Fin. 91'."

I agree with Russell, J., that the liability of an advocate to his client for negligence in performing his professional duties must generally arise from some really elementary mistake and not be an error of judgment on some complicated point or one of doubtful construction. Each case must depend on its own particular facts, and as Scrutton, L.J., said in *Fletcher & Son v. Jubb Booth & Helliwell*, [1920] 1 K.B. 275 at p. 280:

> "And moreover I accept the opinion of Tindal, C.J., in *Godefroy v. Dalton*, 6 Bing. 460, that it would be extremely difficult to define the exact limit by which the skill and diligence which a solicitor undertakes to furnish in the conduct of a case is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that crassa negligentia, or lata culpa mentioned in some of the cases, for which he is undoubtedly responsible. It is a question of degree and there is a borderland within which it is difficult to say whether a breach of duty has or has not been committed."

The first question here is whether or not the respondent firm made any mistake or error in their handling of the appellant company's case in Civil Suit 833 of 1961. Mr. Salter, who appeared for the respondents both at the trial and on this appeal submitted that the third party notice against the appellant company was not misconceived but did in fact lie or alternatively if it was misconceived that the respondents had not been negligent.

The learned trial judge does not arrive at any definite conclusion as to whether the third party proceedings did in fact lie against the appellant. He bases his decision that the respondents' advocates were not liable in negligence rather on the fact that if the respondents had erred, that they had erred in good company, and finally finds the error, if error there was, was an error of judgment only on the part of the advocates.

The first essential is to consider the Act under which the suit was brought. This action was based on the death of the deceased and was brought by virtue of ss. 7 and 8 of the Law Reform (Miscellaneous Provisions) Act, Cap. 74. Section 7 reads as follows:

> "7. If the death of any person is caused by any wrongful act, neglect or default of any person, and the act, neglect or default is such as would, if death had not ensued, have entitled the person injured thereby to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under such circumstances as amount in law to a felony."

The essentials here are –

(*a*) the death of the deceased, and

(*b*) that he died as a result of the wrongful act or default of the person against whom the action is brought in circumstances in which the deceased, if he had not died, could have himself maintained the action.

In this case the deceased died as the result of an accident whilst driving in his capacity as a servant of the appellant company, but it has not been suggested that the accident was due to any neglect on the part of the appellant company. The facts as found show that the accident was due as to sixty per cent. to the negligent driving of the deceased himself and as to forty per cent. to the negligent driving of the driver of the other vehicle.

It is elementary that an employee cannot by his own negligent driving, and without any negligence on the part of his employer, recover damages against his employer for damages caused by his own negligence.

The effect of s. 7 is to keep alive the right of action that would have vested in the deceased if he had not died. The members of the family of the deceased can only maintain an action if the wrongful act, neglect or default was such that the deceased himself, if he had not died, could have maintained an action for damages. The deceased clearly could not have maintained an action against the appellant company for damages arising from his own negligence or from the negligence of another person. It follows, therefore, that the widow could also not maintain an action against the appellant. In short, the facts here show that the appellant company were under no liability to the widow or any member of the deceased's family.

Part IV of the Law Reform (Miscellaneous Provisions) Act deals with joint tortfeasors and the law relevant to the position here is to be found in the following extract from s. 14 (1):

> "where damage is suffered by any person as a result of tort . . . (*c*) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been liable in respect of the same damage."

Here the appellant company were not joint tortfeasors liable in respect of the damage suffered as a result of the death of the deceased person. The company was, no doubt, a joint tortfeasor in respect of damage suffered by other persons injured in the same accident. According to the findings it would be liable as to sixty per cent. of the damage on account of the negligent driving of its servant, the deceased, but it would be under no liability to the deceased himself or to the members of the deceased's family. It would appear therefore to me to be an elementary proposition that the appellant company could not possibly on these facts have been liable to contribute to any damages awarded to the deceased's family and the third party proceedings were therefore entirely misconceived.

This matter was already considered by this Court on the second appeal in plaint 833 of 1961 (*Champion Motor Spares Ltd. v. Barclays Bank D.C.O.*, [1964] E.A. 385). In his judgment Gould, V.-P., pointed out that the third party proceedings in this case were entirely misconceived and Crawshaw, J.A. agreed with him on this point.

Unfortunately while Gould, V.-P., and Crawshaw, J.A. were quite clear on this point the learned President thought otherwise in his judgment. With respect it is clear that the learned President's short expression of opinion on

this matter was based on a misconception of the true facts of this case and of the case to which he referred to, *Drinkwater v. Kimber*, [1952] 2 Q.B. 281. Russell, J., appreciated this in his judgment as he suggests that the judgment of the President was based on an obvious misunderstanding. In any event this judgment could not have influenced the respondents' action as it took place after the proceedings in suit No. 833 of 1961 had for all practical purposes been completed.

The Law Reform (Miscellaneous Provisions) Act, Cap. 74, introduced into Uganda, for the first time, some of the outstanding reforms in English Law in recent years; e.g. the various Fatal Accidents Acts in the United Kingdom; the reforms concerning the apportionment of damages between joint tortfeasors, or in the case of contributory negligence, and the reforms as to the survival of causes of action. It is a law of great importance and any advocate practising in the courts should have a clear and full knowledge of its provisions and if he is in any doubt as to any point under the law then he should have recourse to the Act before advising his clients. The respondent firm called no witnesses and the court does not know what work or research was done by their firm in the matter, nor was there any reason given for the respondent firm acting as it did. I should prefer to think that the error in this case was caused by a genuine mistake rather than ignorance of the law. This could quite possibly have occurred due to the fact that there were three other similar cases consolidated with suit No. 833 of 1961, for the purpose of trial, where the appellant company were correctly held liable for a proportion of the damages. However, no matter what caused the respondent firm to act as it did, the result has been that the appellant company have been ordered to pay a considerable amount for damages and costs for which it was never liable. Russell, J., did not find that the respondents' default was such as to constitute a liability to pay damages. He felt that their default, if any, was an error of judgment, and he referred to the fact that the error had also been overlooked by the various courts hearing the case, and by the other advocates involved. He referred to the High Court judge who first made the *ex parte* order, to the judge who tried the case and to the Court of Appeal to whom the first appeal came. It is apparent that these courts never discovered the error but, both at a trial and on appeal, a court is mainly concerned with the issues as set out in the pleadings or in the grounds of the appeal, as the case may be, and relies largely on the advocates to present their case efficiently and fairly to the court. The advocates who first brought these proceedings were definitely wrong; but if the respondent firm had correctly advised their clients the application would probably have been dismissed with costs but instead the appellant company acting throughout on the advice of the respondent firm have always conceded that the third party proceedings were properly brought.

In the result the appellant company have had to pay Shs. 69,616/71 which it should not have paid. The appellant relied on the appellant's advocates' professional skill, and it would considerably weaken the confidence of the public in the legal profession if advocates can act so carelessly as in this case without the client having any redress.

I agree with Spry, J.A., that the respondents have been guilty of such negligence in the performance of their professional duties as to make them liable in damages to their former clients, the appellant company. I would therefore allow this appeal and set aside the judgment and order of the High Court and in lieu thereof enter judgment for the appellant company for damages Shs. 69,616/71 on the terms and conditions as set out by Spry, J.A.

Sir Clement De Lestang Ag P: I agree and cannot usefully add anything. There will accordingly be an order in the terms proposed by Spry, J.A.

Appeal allowed. Judgment and decree of High Court set aside and order substituted awarding appellant damages of Shs. 69,616/71 with interest and costs.

For the appellant:
PJ Wilkinson, QC and *M Patel*
RE Hunt, Kampala

For the respondents:
C Salter, QC and *OJ Keeble*
Hunter & Greig, Kampala

John v Mnzava
[1969] 1 EA 51 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	29 April 1968
Case Number:	2/1968 (168/68)
Before:	Hamlyn J
Sourced by:	LawAfrica

[1] Affiliation – Onus – Onus on plaintiff in affiliation proceedings in District Court – Plaintiff may elect customary law in Primary Court – Onus more favourable to plaintiff in Primary Court – Proof under "Law of Persons" – Affiliation Ordinance, s. 5 (*Cap.* 278) (*T.*).

[2] Customary law – Paternity – Proof by plaintiff of paternity of child is minimal – Onus more favourable in Primary Court than in District Court – "Law of Persons" – Affiliation Ordinance, s. 5 (*Cap.* 278) (*T.*).

Editor's Summary

The appellant lived with the respondent for eight years during which time she gave birth to two children by him out of wedlock for whom the respondent admitted paternity and in respect of whom a maintenance order had already been made. During 1966 the respondent left Dar-es-Salaam and in March, 1967 the appellant gave birth to twin children of whom she claimed the respondent to be the father. She applied to the District Court for maintenance under the Affiliation Ordinance. The respondent denied that the twins were his and the only evidence on record was that of the two parties themselves.

Held –

(i) the appellant was unrepresented by counsel and had to make an election between the remedies available either under the Affiliation Ordinance or under customary law;

(ii) the appellant could not avail herself of both remedies nor was she permitted to "switch" from one to the other during the course of the case;

(iii) under the customary law, the onus of showing that the respondent was not the father of the child was cast upon him, a position entirely different from that obtaining under the Affiliation Ordinance;

(iv) the fairest order was that the case should be heard de novo.

Proceedings quashed.

Cases referred to in judgment:

(1) *Moore v. Hewitt*, [1947] 2 All E.R. 270.

Judgment

Hamlyn J: This is an appeal against the judgment of the District Court of Dar-es-Salaam in affiliation proceedings brought by the appellant in that court.

The facts of the case are simple. The appellant, a Miss Hulda John, lived with the male respondent between 1956 and 1964, during which time she gave birth to two children by him out of wedlock. These two children the respondent admits as being his, and a maintenance order has already been made by the court in respect of them. During the year 1966 the respondent took up certain work at Magamba, leaving the appellant and the two children in Dar-es-Salaam: in March, 1967 she gave birth to twin children, of whom she claims the respondent to be the father. He, however, denies that the children are his and states that he met the appellant last in August, 1966 but did not then have sexual intercourse with her.

The only evidence upon the record is that of the two parties themselves, the woman claiming that the man is the father of the twins, while the respondent denies the allegation. It is a part of the appellant's case of course that the intercourse of the respondent with her was at a time which corresponded with the ordinary process of gestation and resulted in the birth of the twins on the date stated.

The memorandum of appeal has been presented by the woman and has not (it seems) been drawn with any expert advice by counsel. She complains, *inter alia*, of the decision of the district court in ruling that there was insufficient evidence upon the record to prove that the respondent is the father of the twins. In the alternative she claims that she had further evidence available (though she does not specifically state that the witnesses were present at the court at the time of the hearing) to support her allegations as to paternity, but that the trial magistrate "denied me the right to bring my witnesses".

The proceedings were filed by the appellant in the District Court of Dar-es-Salaam, apparently without her having obtained professional advice in the matter. It is often a matter of considerable difficulty for a litigant to appreciate the niceties of legal procedure and to select the best forum before which proceedings should be brought. In a case of this nature it may well be that the appellant was unaware that her case (as she produced it) would have had a considerably greater chance of success had she selected the primary court instead of the district court as her forum.

The Affiliation Ordinance (Cap. 278) now covers litigation of the instant kind between all persons, since the repeal of the original restrictive s. 14 of the enactment. The new s. 14, introduced by the Affiliation Ordinance (Amendment) Act, 1964, provides that proceedings commenced under customary law – that is, in the primary courts – disentitle the litigant from asking for an order under the Affiliation Ordinance; similarly, where a litigant has seen fit to proceed under the Ordinance, the provisions applicable under customary law do not apply. In other words, the litigant must make an election between the remedies available either under the Affiliation Ordinance or under customary law; she cannot avail herself of both, nor is she permitted to "switch" from the one to the other during the course of the case. The appellant, having selected the district court as the place to do justice to her claim, is therefore now bound by her original election and cannot now be heard if she desires to seek another and different forum.

I have made the above observations not because there is any application by the appellant before me for the "transfer" of these proceedings to any other tribunal. That is not the case. The relevancy of the remarks concerns procedural matters under the Affiliation Ordinance and under customary law.

Section 5 of the Affiliation Ordinance deals with the making by the court of maintenance orders. In the main, it follows the well-known principles embodied in the English Bastardy Laws Amendment Act, 1872. This requires that the evidence of the mother of the child or children as to paternity must always be corroborated in some material particular by independent testimony (direct or circumstantial) confirming that part of the evidence of the mother which implicates the defendant. The wording of the relevant part of s. 5 (1) of the Ordinance requires that the woman herself shall give evidence as to the paternity of the child and then continues:

> "And if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the magistrate, he may adjudge the person summoned to be the putative father of the child."

Under the provisions of the Ordinance, therefore, (under which the appellant elected to proceed) there was a requirement for her to adduce evidence aliunde in support of her own allegation; this she has not done.

I have recorded the above at some length in view of the fact that the appellant, until she came before this court, had not had the benefit of counsel's advice. In filing her petition in the district court I doubt whether she even knew that she was making an election as to forum.

Under the Magistrates' Courts Act, 1963, she had of course the right to file her case in the primary court and, had she done so, an entirely different set of parameters would have applied. In that court "The Law of Persons", as set out in Government Notice No. 279 of 1963, would have governed the proof of paternity of the twins and would have given the appellant a much easier mode of proof of her contentions. Paragraph 183 of that subsidiary legislation reads:

> "183. The man whom the woman names as father of her child may not deny paternity unless he can prove that he had no sexual intercourse with the woman."

while para. 186 reads:

> "186. If a man named insists that he had never had sexual intercourse with the woman and produces evidence, the woman shall be required to prove her assertion by giving details regarding place, time, physical characteristics of the man and by calling witnesses to her relationship with the man in question."

It therefore appears from the wording of these paragraphs that the onus of showing that the respondent is not the father of the child is cast upon him – a position entirely different from that obtaining under the Affiliation Ordinance. Proof of paternity in the primary courts is therefore minimal, while a considerably higher standard is requisite in the district courts; onus of proof varies according to which legislation governs the matter.

I have little doubt that the appellant was entirely unaware of this when she filed her petition, nor did she probably know of the alternative courses open to her.

In her memorandum of appeal she complained (as I have already noted) that she was denied by the court the right of calling two witnesses to corroborate her own evidence as to the paternity of the twins. There is nothing on the record to show that such allegation is correct and I can scarcely believe that a magistrate of the standing of the senior resident magistrate who heard the case would have acted in the manner alleged. There may however have been some misunderstanding as to the calling of these additional witnesses whom the appellant

states she desired to testify, and, if this is the case, the matter will have to be remedied.

In the event, I consider that in view of the complexities of procedure in this case and that the appellant did not have the advantage of proper advice, and further that there may have been some confusion as to the calling of witnesses by the appellant, the fairest order would be that the case should be heard de novo. This will necessitate the quashing of the present proceedings in the district court, and I so order.

Learned counsel who appeared before me at the hearing of this appeal referred me to the case of *Moore v. Hewitt*, [1947] 2 All E.R. 270. Though that decision had no real reference to the original hearing in the district court, it would seem to furnish "guide lines" as to the presentation of the appellant's case at the re-hearing, with no particular reference to the question of corroboration of the appellant's evidence.

I consequently remit the proceedings to the district court for the matter to be re-heard before another magistrate, the former proceedings being quashed.

Order accordingly.

For the appellant:
FA Adamjee
Fraser Murray, Roden & Co, Dar-es-Salaam

No appearance for the respondent.

The Pioneer General Assurance Society Ltd v Kamunye and others
[1969] 1 EA 54 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	16 October 1968
Case Number:	377/1967 (142/68)
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Land Law – Mortgage – Mailo land mortgaged – Mortgagee taking rents – Whether taking rents amounts to entering into possession – What remedies open to mortgagee – Registration of Titles Act (*Cap.* 205) *ss.* 117, 120, 121 – *Land Transfer Act* (*Cap.* 202) *s.* 2 (*U.*).

[2] Limitation – Mortgage – Mailo land – Mortgagee taking rents – Whether cause of action arises when mortgagor defaults or when rent ceases to be paid – What period of limitation applies – Limitation Act (*Cap.* 70), *ss.* 35 *and* 37 (2) – *Real Property Limitation Act* 1874, *s.* 8 (*U.*).

Editor's Summary

The owner of mailo land in Uganda charged it in 1943 by a mortgage and a charge to the plaintiffs as security for loans totalling Shs. 180,000/-, repayable within ten years. The mortgages limited the plaintiffs' statutory power of sale to a sale or sales to natives of Uganda unless the consent of the Governor and of the Lukiko should first have been obtained; limited the plaintiffs' powers of foreclosure and distraint, so far as they related to native tenants, to receiving the rents and profits of the land; and further provided that the plaintiffs could only take proceedings for the ejectment of non-native tenants. Nothing was paid off on the loans except interest, so that by 1968 the total amount owed was about Shs. 2,000,000/-. The owner let some of the land to non-native tenants, and with his consent the plaintiffs collected the rents from 1943 towards reduction of the mortgage debt. In 1958, having heard of the owner's death, and being uncertain of his successor, the tenants ceased paying the rents, and took out

interpleader proceedings. The plaintiffs subsequently claimed the arrears of rent on the grounds that they were mortgagees in possession by virtue of receiving the rents, and that they were legally entitled to the same position under s. 120 of the Registration of Titles Act. The plaint was filed on March 6, 1968. The main question which arose was limitation, and when the cause of action arose.

Held –

(i) the period of limitation applicable was twelve years;

(ii) the plaintiffs as mortgagees had entered into possession of the mortgaged land by receiving the rents;

(iii) the cause of action arose in 1958 when the tenants withheld the rents;

(iv) the action was not time-barred.

Cases referred to in judgment:

(1) *M. A. Singh v. S. W. Kalubya*, [1963] E.A. 408.

(2) *Harlock v. Ashberry* (1882), 19 Ch.D. 539.

Judgment

Sheridan J: By a mortgage dated June 30, 1943 Daudi Muise Mwebe (the deceased), the registered proprietor of mailo land, mortgaged it to the plaintiffs as security for a loan of Shs. 150,000/-, repayable within ten years. It was provided that the deceased should be at liberty to reduce the debt by one payment of Shs. 50,000/- on or after June 30, 1944 and before the date of maturity on giving six months' notice to the plaintiffs, but should not be entitled to repay the balance of the principal sum, viz. Shs. 100,000/- before the said date of maturity.

It was further provided that as long as the principal sum or any part thereof should remain unpaid, interest on it should be paid at the rate of twelve per cent. per annum, commencing on July 1, 1943. There was also a provision for the payment of cumulative interest at the same rate. The deceased also undertook to insure his life for Shs. 50,000/- and to assign the life policy to the plaintiffs.

The mortgage also provided –

(1) that the power of sale conferred by s. 118 of the Registration of Titles Ordinance (now s. 117 of Cap. 205 of the Laws of Uganda) should be restricted to a sale or sales to natives of the Protectorate unless the consent of the Governor and of the Lukiiko should have first been obtained;

(2) that in the event of the plaintiffs exercising the powers conferred on them by ss. 119 (foreclosure) and 120 (distraint) (now ss. 120 and 121) the same should be limited (so far as related to native tenants of the said lands) to receive the rents and profits thereof, and the plaintiffs should not have power to take any proceedings for ejectment of any tenants other than non-native tenants of the said lands.

By a further charge dated December 15, 1943 a further sum of Shs. 30,000/- was advanced to the deceased upon the same terms.

The accounts from June 19, 1943 to July 1, 1960 show that the only amounts paid by the deceased were

(1) on June 23, 1943 Shs. 5,100/- interest on the loan of Shs. 150,000/- at twelve per cent. per annum from June 19, 1943 (should this not have been June 30?) to September 30, 1943;

(2) on December 15, 1943 Shs. 4,612/50 interest on Shs. 150,000/- from October 1 to December 31, 1943, and on Shs. 4,500/- being interest on interest between the same dates;

(3) on the same date Shs. 4,500/- interest in advance from January 1 to March 31, 1944;

(4) On December 20, 1943 interest on Shs. 30,000/- from December 15, 1943 to March 31, 1944.

Thereafter the only payments shown are from Uganda Sugar Factory Ltd. and Uganda Tea Estates Ltd. (hereinafter referred to as "the tenants") in respect of rent due by them for part of the land which they had leased from the deceased. It is not in dispute that with the deceased's consent the plaintiffs collected rents from the mortgaged land towards reduction of the mortgage debt.

By July 1, 1960 the amount outstanding was Shs. 1,181,728/32, and I was informed from the Bar that it is now in the region of Shs. 2,000,000/-. On the face of it the bargain was harsh and unconscionable.

The tenants ceased paying the rents from October 1, 1958 – some Shs. 5,000/- per annum, I am told – on hearing of the deceased's death and being uncertain as to his successors. When they received rival claims from the plaintiffs and defendants, they took out interpleader proceedings under O. 31 of the Civil Procedure Rules.

On December 20, 1967 Dickson, J., made a consent order that upon the tenants paying Shs. 20,727/20 arrears of rent up to December 31, 1967 into Court they were released from these proceedings. In their plaint (para. 8) the plaintiffs claim that the arrears of rent amount to Shs. 61,439/25. No evidence was called but it was pleaded that the deceased died in 1954 and that there was a delay in appointing his successors.

Mr. Wilkinson, for the plaintiffs, submits:

(1) that the plaintiffs were mortgagees in possession by receiving the rents from 1943 with the deceased's consent, and

(2) that the plaintiffs became legally entitled to the same position in default of payment of the principal sum and interest under the mortgage and charge by virtue of s. 120 of the Registration of Titles Act. Section 120 provides:

> "120. The mortgagee or his transferees, upon default in payment of the principal sum or interest or any part thereof respectively at the time mentioned in the mortgage, may enter into possession of the mortgaged land by receiving the rents and profits thereof, and may distrain upon the occupier or tenant of the land under the power to distrain hereinafter contained, or may bring an action of ejectment to recover the land either before or after entering into the receipt of the rents and profits thereof or making any distress, and either before or after any sale of such land is effected under the power of sale aforesaid, in the same manner in which he or they might have brought such action if the mortgage money had been secured to him or them by an assurance of the legal estate in the land mortgaged; and any mortgagee or his transferees shall be entitled to foreclose the right of the mortgagor or his transferees to redeem the mortgaged land in manner hereinafter provided."

The plaintiffs' case is that short of sale by public auction to an African, this is the only remedy which they have. This is by reason of s. 2 of the Land Transfer Act (Cap. 202) which provides:

> "2. No non-African or any person acting as his agent shall without the consent in writing of the Minister occupy or enter into possession of any land of which an African is registered as proprietor (otherwise than by receiving rents and profits payable by non-Africans who have gone into occupation or possession with the consent of the Minister) or make any

> contract to purchase or to take on lease or accept a gift inter vivos or a bequest of any such land or of any interest therein other than a security for money:"

This legislation is admittedly discriminatory: see *M. A. Singh v. S. W. Kulubya*, [1963] E.A. 408. If the plaintiffs could foreclose then they could in effect become the registered proprietors of mailo land, which is contrary to the purpose of the legislation. I can see nothing inconsistent with the plaintiffs at first becoming mortgagees in possession, with the consent of the deceased, and later remaining in possession under the sanction of s. 120 of the Act.

The main question in this suit is: when did the cause of action arise? Arising out of that, what is the period of limitation? The Limitation Act (Cap. 70), which came into force on May 7, 1959, ss. 35 and 37 (2) provide:

> "35. The time for bringing proceedings in respect of a cause of action which arose before the commencement of this Act shall, if it has not then already expired, expire at the time when it would have expired apart from the provisions of this Act or at the time when it would have expired if all the provisions of this Act had at all material times been in force, whichever is the later."
>
> "37 (2). The Acts of the United Kingdom mentioned in the Second Schedule to this Act shall, in so far as they have effect in Uganda, cease to have that effect to the extent specified in the third column of that Schedule."

The relevant Act is the Real Property Limitation Act, 1874. Section 8 provides:

> "8. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgement, or the last of such payments or acknowledgments, if more than one, was given."

The plaint was filed on March 6, 1968. If the cause of action arose on June 30, 1953 when the deceased defaulted by not repaying the mortgaged debt, then the plaintiffs are time-barred. If, on the other hand, it arose on September 30, 1958 when the tenants withheld the payments of rent, and if those payments constituted an acknowledgment of the debt on behalf of the defendants, it is in time. Mr. Binaisa, for the defendants, relies on *Harlock v. Ashberry* (1882), 19 Ch.D. 539, where it was held that a payment of rent by a tenant of the mortgaged property to the mortgagee was not a payment by the person liable to pay the debt. That decision depended on the meaning of the word "paid" in s. 40 of the Real Property Limitation Act, 1833, and it was held that it involved by implication the addition of "by the person liable to pay". The Court of Appeal, in reversing the judgment of Fry, J., observed that the principle underlying all the Statutes of Limitation was that a payment to prevent the barring by statute must be an acknowledgment by the person making the payment of his liability, and an admission of the title of the person to whom the payment is made. I do not think that decision can prevail over the clear wording of

s. 120 of the Act that a mortgagee may enter into possession of the mortgaged land by receiving the rents and profits thereof. That is what the plaintiffs have done, and all they could do short of selling the land to an African.

Whilst I am reluctant to countenance this one-sided bargain, and not overlooking the fact that the plaintiffs have been dilatory in allowing the rents to accumulate in the hands of the tenants for ten years, I cannot refuse their prayer for a declaration that they are entitled to the rents and profits accruing from the mortgaged land for as long as the tenants remain in occupation thereof, and to appropriate the same towards a reduction of the mortgaged debt.

Order accordingly. Plaintiffs' costs.

For the plaintiffs:
PJ Wilkinson, QC and *JS Shah*
JS Shah, Kampala

For the defendants:
GL Binaisa, QC and *HG Gandesha*
Gandesha & Co, Kampala

The Commissioner of Income Tax v Irish Electrical Co Ltd
[1969] 1 EA 58 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	13 November 1968
Case Number:	22/1968 (143/68)
Before:	Sir Clement de Lestang Ag P, Duffus Ag V-P and Law JA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Farrell, J

[1] Civil Practice and Procedure – Execution – Distress – Abandonment of.

[2] Civil Practice and Procedure – Execution – Priority between Commissioner of Income Tax and judgment creditor.

[3] Injunction – Interim Injunction – Conditions imposed on applicant for – Observations as to whether a mere undertaking to indemnify is a satisfactory condition.

[4] Injunction – Interim Injunction – Effect – Suit brought for permanent injunction to restrain Commissioner of Income Tax from carrying out distraint on goods and chattels – Interim injunction granted – Commissioner leaving goods on premises – Goods then seized by judgment-creditor in execution of decree – Interim injunction discharged – Whether Commissioner had abandoned his

distress – Whether Commissioner or judgment-creditor entitled to goods – East African Income Tax (*Management Act*) 1958, *s.* 125 – *Civil Procedure* (*Revised*) *Rules* 1948, *O.* 39, *r.* 1 (*K.*).

Editor's Summary

On June 10, 1966 the appellant Commissioner distrained upon certain goods and chattels belonging to one Mulji Jetha Ltd. at premises in Nairobi acting under the powers contained in the East African Income Tax (Management) Act, 1958, s. 125. On the same day Mulji Jetha Limited obtained an interim injunction from the High Court of Kenya restraining the appellant from completing the distraint; and upon receiving notice of the interim injunction the appellant agreed with Mulji Jetha Ltd. to leave the goods and chattels on the premises. On July 19, 1966, the respondent, in execution of a decree, seized the goods and chattels on the premises of Mulji Jetha Ltd. The appellant and respondent subsequently agreed that the goods be sold; but that the proceeds be held upon trust for the two parties until their respective rights were judicially

determined. On July 29, 1966, the suit for an injunction brought by Mulji Jetha Ltd. against the respondent was dismissed and the interim injunction was discharged. The High Court found that the appellant (as plaintiff in the suit) on being served with the interim injunction had abandoned the distress, i.e. had abandoned the goods and chattels previously seized; and that the respondent was entitled to seize the goods, and that the respondent was therefore entitled to the proceeds of sale. The appellant appealed.

Held –

(i) a distraining creditor can only be said to have abandoned a distress if there is evidence of some intentional and deliberate act on his part indicating that in quitting the premises he intends not to return;

(ii) on the facts the appellant had not abandoned the goods and chattels; and the effect of the interim injunction should have been to preserve the status quo pending determination of the injunction suit.

Appeal allowed and decision of High Court reversed. By consent, no order as to costs.

Observation (by Law, J.A.): A mere undertaking to indemnify is not a satisfactory condition to impose upon an applicant for an injunction who, from the nature of his application, is likely to prove insolvent.

Cases referred to in judgment:

(1) *Swann v. The Earl of Falmouth* (1828), 108 E.R. 1112.

(2) *Hunt v. Hooper* (1844), 152 E.R. 1365.

(3) *Lumsden v. Burnett*, [1898] 2 Q.B. 177.

November 13, 1968. The following considered judgments were read:

Judgment

Law JA: This is an appeal by the Commissioner of Income Tax from a decision of the High Court of Kenya (Farrell, J.) on a case stated under Ord. XXXIV of the Civil Procedure (Revised) Rules 1948. In those proceedings the appellant was the unsuccessful plaintiff. The agreed facts and the questions of law for the Court's determination are set out in the case stated as follows:

"1. That the plaintiff is a corporation sole under and by virtue of s. 148A of the East African Income Tax (Management) Act 1958.

2. That the defendant is a company incorporated in Ireland.

3. That on or about the 10th day of June, 1966, the plaintiff began to distrain upon certain goods and chattels of one Mulji Jetha Ltd. at its premises at River Road, Nairobi, under his powers contained in s. 125 of the East African Income Tax (Management) Act 1958.

4. That the said Mulji Jetha Ltd. on the same day obtained an interim injunction restraining the plaintiff from completing the said distraint, and the plaintiff did not thereafter continue with the distraint.

5. That at the time the said Mulji Jetha Ltd. served the injunction aforesaid upon the plaintiff, the plaintiff had seized the said goods and chattels and had at the request of the said Mulji Jetha Ltd. agreed to leave them on its premises pending the sale thereof.

6. That the said Mulji Jetha Ltd. thereafter applied to this Honourable Court for a permanent injunction preventing the plaintiff from distraining upon the said goods and chattels, in High Court Civil Suit No. 594 of 1966. This suit was dismissed on July 29, 1966 and the interim order referred to in para. 4 discharged.

7. That on or about July 19, 1966, while the proceedings referred to in para. 6 were in train, the defendant purported to attach the said goods and chattels at the premises of Mulji Jetha Ltd. in execution of a decree obtained by it in High Court Civil Suit No. 474 of 1966, and seized and took physical possession of them.

8. That the plaintiff and the defendant thereafter agreed that the defendant complete its attachment of the said goods and chattels without prejudice to the rights of the plaintiff, and that the proceeds thereof be held upon trust for the plaintiff and the defendant jointly until it may be determined whether the plaintiff or defendant is entitled to them.

The questions of fact and of law upon which the opinion of this Honourable Court is sought are as follows:

1. The plaintiff, having commenced a distraint upon the said goods and chattels and having been temporarily restrained from completing the distraint by an interim order of the Court, which order was later discharged, was the defendant lawfully entitled to attach the said goods and chattels in execution of its decree?

2. Whether the plaintiff or the defendant is entitled to the proceeds of the sale of the said goods and chattels?"

At the trial of the case stated the following document headed "Sequence of Events" was put in by agreement:

"1. Mr. Goslin of the Income Tax Department served the warrant on the Managing Director of Mulji Jetha Ltd. at 10.30 a.m.

2. Mr. Goslin was accompanied by Mr. Pirbhai who took an inventory of the furniture and sent his assistant to get a Gold Appraiser. No inventory of the gold or jewellery was taken.

3. Mr. Goslin and Mr. Pirbhai stayed at the premises until they heard of the injunction at about noon when they left."

The learned judge decided the case stated in favour of the defendant (now respondent) finding that the plaintiff (now appellant) discontinued the distress proceedings on being served with the interim injunction, "as he was bound to do"; that the appellant did not continue in possession; and that "the only reasonable interpretation of what happened is that he abandoned the distress, reluctant as he may have been to do so". In other words, the learned judge inferred from the admitted facts that there had been an abandonment of the goods and chattels distrained upon by the appellant, and he held that there was no legal impediment to the execution subsequently levied by the respondent upon the same goods and chattels, and he decided the case stated in favour of the respondent. From this decision the appellant appeals.

Before dealing with arguments raised on this appeal, the history of events should I think be completed by setting out the material portions of the interim injunction. It was ordered:

"1. That the defendant (the present appellant) his servants or agents are hereby restrained from levying distress upon or removing from the plaintiff's (Mulji Jetha Ltd.) premises any goods or effects the property of the plaintiff therein pending the hearing of the said summons.

2. That the plaintiffs (sic) their servants or agents are hereby restrained from disposing of or removing from the said premises any of the goods or effects therein the property of the plaintiff pending the hearing of the said summons.

3. That the plaintiff will indemnify the defendant against any loss which he may suffer as a result of this order."

With reference to this last paragraph, I would remark in passing that there is not much point in ordering an applicant for an interim injunction restraining a distress to indemnify against any loss the person who is seeking to levy the distress, because such an indemnity is likely, as in this case, to be valueless. The better practice seems to be as stated in 12 Halsbury's Laws (3rd Edn.), pp. 168 – 169, para. 319, that is to say to refuse an injunction (unless it is a flagrant case) except upon the condition of the applicant paying the amount claimed into court; to which condition I would suggest the possible alternative of the applicant providing independent security to indemnify against any consequent loss if he cannot raise the amount claimed. A mere undertaking to indemnify is not a satisfactory condition to impose upon an applicant for an injunction who, from the nature of his application, is likely to prove insolvent.

Mr. Lutta, for the appellant, began by submitting that the distress in this case was completed before the issue of the interim injunction, which in his submission was accordingly superfluous and without effect. I do not think we can entertain this argument. Paragraphs 3 and 4 of the case stated, and para. 1 of the questions for decision, make it clear that the matter was submitted to the High Court on the basis that the distraint had been commenced, but not completed, and it is clear from r. 4 of Ord. XXXIV that a party to a case stated is bound by the statements contained therein. Mr. Lutta further submitted that the learned judge erred in holding that the appellant abandoned possession of the goods and chattels on Mulji Jetha Ltd.'s premises when his representatives left the premises on hearing of the issue of the injunction. Mr. Lutta submitted that the effect of an interlocutory injunction is merely to preserve the status quo pending determination of the issues between the parties, and that the appellant, in obeying the court's order restraining him from proceeding with the distress and removing the debtor's goods, cannot be said to have done any act from which the inference could reasonably be drawn that he intended to abandon the distress. Mr. Lutta relied on *Swann v. The Earl of Falmouth* (1828), 108 E.R. 1112, and in particular on the following extract from the judgment of Bayley, J.:

> ". . . if therefore he (the landlord) quitted possession of the goods whilst they remained on the premises, that was an abandonment of the distress; but the mere leaving of the goods in a place where he has the right to keep them, without anything to indicate an intention to abandon the distress, cannot operate as an abandonment."

Mr. Lutta referred to sub-s. (3) of s. 125 of the East African Income Tax (Management) Act 1958, which gives the Commissioner the right to leave goods which have been seized on the premises pending sale, and he submitted that no inference of intention to abandon the distress could be drawn from the appellant's action in this respect.

Mr. Couldrey for the respondents conceded that the appellant had possession of the goods when he levied the distress, but submitted that he abandoned possession on hearing of the issue of the interim injunction. Mr. Couldrey relied on the case of *Hunt v. Hooper* (1844), 152 E.R. 1365, in which it was held that where a sheriff was issued with a writ of fieri facias for execution, and the judgment creditor instructed the sheriff not to execute the writ until further orders, such an instruction was equivalent to a withdrawal of the writ, and Mr. Couldrey submitted that it makes no difference whether the order of stay comes from the attaching creditor or from the court – the effect is the same, there is in fact an abandonment of the creditor's rights.

I find myself unable to agree with this submission. In *Lumsden v. Burnett*, [1898] 2 Q.B. 177, possession of distrained goods was given up by the sheriff on the strength of a document signed by the debtor's daughter, a child of thirteen, without the authority or knowledge of the debtor, undertaking to allow the sheriff to re-enter at any time to resume possession, and undertaking not to remove the goods from the premises. The Court of Appeal was unanimous that in these circumstances the sheriff went out of possession with the intent of returning, and not of abandoning possession. As A. L. Smith, L.J. said (at p. 182):

> ". . . the question is always one of fact, and is whether the sheriff by going out of possession, as he did here, abandoned the possession."

In my view the facts of the present appeal are stronger than the facts in *Lumsden's* case (*supra*) in favour of the appellant, who went out of possession not on the strength of an undertaking given by an unauthorized person, but in obedience to the terms of an interim injunction issued by the High Court restraining him from taking any further steps in the distress, pending the determination of the debtor's suit for a permanent injunction, which was in the event dismissed. In my view, a distraining creditor can only be said to have abandoned a distress if there is evidence of some intentional and deliberate act on his part indicating that in quitting the premises he intends not to return. In this case the appellant left the goods and quit the premises solely because of the issue of the interim injunction, intending to return if the application for a permanent injunction was dismissed, and assuming that the status quo would be maintained in the interval. I can find no evidence at all in the record to support the finding that the appellant wilfully abandoned the distress, or intended to abandon it, and I am satisfied that in fact he did not abandon it. For these reasons I would allow this appeal, set aside the order of the High Court declaring that the respondent is entitled to the proceeds of sale of the debtor's goods, and substitute an order that the appellant is entitled to those proceeds. The parties have agreed that there should be no order as to the costs of this appeal.

Duffus Ag V-P: I have read and entirely agree with the judgment of Law, J.A. It appears from para. 5 of the Case Stated that the appellant, the Commissioner of Income Tax, had already seized the goods and chattels the subject of the levy, at the time that he was served with the interim injunction and had at the request of the debtor Mulji Jetha Ltd. agreed to leave these on the premises pending the sale.

The purpose of the interim injunction was to ensure that matters were kept in statu quo until the question was finally disposed of. This is in accordance with r. 1 of Ord. XXXIX of the Civil Procedure (Revised) Rules 1948, and is also apparent by reference to the interim injunction itself.

With respect, on the facts of this case, I cannot agree with the learned trial judge that the appellant had abandoned the distress. It is clear that he only obeyed the order of the Court and proceeded no further on the matter whilst the interim injunction was pending. On the discharge of the interim injunction the matter reverted to the original position, i.e. that the appellant had already seized these goods and these were in his constructive possession on the premises of the debtor in accordance with the agreement between the debtor and himself. There was at this stage therefore no need for the appellant to proceed with another distress on goods already seized and in his custody, but rather he would proceed to enforce the distress from the stage at which action had been suspended by reason of the interim injunction. The appellant's distress therefore had priority over the subsequent attachment of the goods by the respondent company.

I agree with Law, J.A. that this appeal be allowed in accordance with the order that he proposes.

Sir Clement De Lestang Ag V-P: I have had the advantage of reading in draft the judgment prepared by Law, J.A. I am in complete agreement with it. As Duffus, Ag. V.-P., also agrees, there will be an order in the terms proposed by Law, J.A.

Appeal allowed.

For the appellant:
BCW Lutta (Counsel to the East African Community) and *T Lubale*
The Counsel to the East African Community, Nairobi

For the respondent:
JA Couldrey
Kaplan & Stratton, Nairobi

The National Union of Clerical Commercial and Technical Employees v Drapers Ltd
[1969] 1 EA 63 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	24 October 1968
Case Number:	164/1967 (146/68)
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Arbitration – Award – Trade dispute – Award resulting from dispute between a Trade Union and employers may not be enforced by action by the Union – Trade Disputes (*Arbitration and Settlement*) *Act* (*Cap.* 200) (*U.*).

[2] Trade Union – Right to sue – Whether Trade Union may sue on behalf of employees some of whom are members of the Union for enforcement of an award against employers – Trades Union Act, s. 13 (1) (*U.*).

Editor's Summary

A dispute arose between the defendant and its employees as to their terms of service. Some of these employees were members of the plaintiff Union registered under the Trade Unions Act. Under s. 2 of the Trade Disputes (Arbitration and Settlement) Act (hereinafter referred to as the Act) the Minister of Labour referred the dispute to an arbitration tribunal consisting of three advocates, the chairman being an

independent advocate, and the other two advocates being nominated respectively by the plaintiff Union and by the defendant employer. After submission of their award to the Minister it was published in the Uganda *Gazette*. The award was to the effect that certain increases of salaries were to be awarded to its employees by the defendant employer. The plaintiff Union instituted proceedings against the defendant employer on behalf of the employees to enforce the award. A preliminary issue of law was whether the plaintiff had a cause of action under the Act. Section 13 (*d*) of the Act confers upon a registered Trade Union the right to sue under its registered name. Section 10 of the Act provides to the effect that an award binds the employer and its employees to whom the award relates, and the terms of the award become implied terms of the contract between the employer and its employees.

Held –

(i) in principle a Trade Union may sue only in its own name for wrongful acts against itself;

(ii) the plaintiff Union had no cause of action on behalf of the employees whether members of the Union or otherwise.

Case dismissed.

Cases referred to in judgment:

(1) *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] L.J.K.B. 905.

(2) *British Motor Trade Association v. Salvadori and Others*, [1949] 1 All E.R. 208.

(3) *National Union of General and Municipal Workers v. Gillian and Others*, [1945] 2 All E.R. 593.

(4) *Bobbey v. W. M. Crosbie & Co. Ltd.*, [1915] L.J.K.B. 856.

Judgment

Sheridan J: By para. 1 of their written statement of defence, the defendants have raised a preliminary issue of law that the plaintiff has no cause of action under s. 13 of the Trades Dispute (Arbitration and Settlement) Act (Cap. 200) (hereinafter referred to as "the Act") or otherwise. I have been asked to decide this issue after hearing the submissions of Counsel and before any evidence is called.

The matter arises in this way. A dispute arose between the defendants and their employees as to their terms of service. Some of these employees are members of the plaintiff union, which is a union registered under the Trades Union Act (Act 11 of 1965). Under s. 2 of the Act the Minister of Labour referred the dispute to an arbitration tribunal consisting of three advocates, with Mr. J. S. Shah as Chairman, Mr. A. K. Mayanja, nominated by the plaintiff union and Mr. C. Mboijana, nominated by the defendants, the employers. Under s. 7 of the Act the award was submitted to the Minister. Under s. 8 (1) he caused it to be published in the Uganda *Gazette* of February 17, 1967 as General Notice No. 157 of 1967. It reads:

"General Notice No. 157 of 1967.

In the Matter of the Trades Disputes (Arbitration and Settlement) Act.

(No. 20 of 1964).

National Union of Clerical, Commercial and Technical Employees

With

Drapers Limited.

Arbitration Award.

Whereas differences have arisen between Drapers Limited (hereinafter known as Employer) and National Union of Clerical, Commercial and Technical Employees (hereinafter known as Union),

And Whereas under the Trades Disputes (Arbitration and Settlement) Act, an Arbitration Tribunal consisting of Jayantilal S. Shah, Esq., as Chairman and Abu Mayanja, Esq., and C. Mboijana, Esq., having heard and duly weighed and considered the several issues and their evidence Do Hereby make this our Award concerning the matters so referred to us in the manner following, that is to say:

(1) We adjudge and award that the said Employer do grant their Employees drawing salaries up to and including Shs. 500/- a yearly increment of 20 per cent. on the basic salary as at 1st July, 1964.

(2) We further adjudge and award that the said Employer do grant their Employees drawing salaries of Shs. 501/- onwards as at 1st July, 1964, a yearly increment of 12 ½ per cent.

(3) We further adjudge and award that this award shall be effective from 1st July, 1964.

In Witness Whereof the said Chairman, J. S. Shah, and Arbitrators, Abu Mayanja and C. Mboijana, have affixed their hands at Kampala, this 19th day of January, 1967.

J. S. Shah

Chairman.

A. K. Mayanja,

C. Mboijana,

Arbitrators.

E. J. B. Mpyisi

Permanent Secretary/Labour Commissioner,

Ministry of Labour

Kampala,

6th February, 1967."

It is not in dispute that the defendants have refused to give effect to the award.

Para. 6 of the plaint reads:

"6. The Plaintiffs will contend that the Defendants are bound by this Award in terms of Sec. 10 of the Act on which they will rely to support this view and that the Defendants ought to be condemned to pay."

The plaint concludes with a prayer that judgment be entered against the defendants for payment of the money now due to their employees in terms of the award forthwith. Section 10 of the Act provides:

"10. Any agreement, decision or award made under the provisions of this Act shall be binding on the employers and workmen to whom the agreement, decision or award relates and, as from the date of such agreement, decision or award or as from such date as may be specified therein not being earlier than the date on which the dispute to which the agreement, decision or award relates first arose, it shall be an implied term of the contract between the employers and workmen to whom the agreement, decision or award relates that the rate of wages paid and the conditions of employment to be observed under the contract shall be in accordance with such agreement, decision or award until varied by a subsequent agreement, decision or award."

Section 13 of the Trades Union Act provides:

13 (1). The rights, immunities or privileges conferred by this Act on a registered trade union shall be as follows, that is to say,. . .

(*d*) a registered trade union may sue or be sued under its registered name;. . ."

Counsel for the defendants submits that once the award is made the plaintiff union cannot seek to enforce it on behalf of the employees, whether they are members of the union or not. Under s. 10 of the Act, the award becomes an implied term of the contract between the employers and the workmen to whom the award relates that the rate of wages paid and the conditions of employment to be observed under the Contract shall be in accordance with the award. A sum due by virtue of an award to any person employed in an undertaking may be recovered by him summarily as a civil debt from the employer: 38 Halsbury's Laws (3rd Edn.), p. 154. It is for the individual workman to sue the defendants for non-compliance with the terms of the award or for a representative suit to be brought under the Civil Procedure Rules, O. 1, r. 8 (1), where, as in this case, there are numerous persons having the same interest in one suit. This suit is not brought under that provision. Nor can

it be said that the plaintiffs have the same, or any legal interest with the defendants' employees.

Counsel for the plaintiffs submits that s. 13 (1) (*d*) of the Trades Union Act does give them a locus standi. The defendants recognize them as the bargaining body for its employees. They were a party to the arbitration and they are the appropriate body to enforce the award. Counsel likens this suit to a claim by a partnership on behalf of its members, but this analogy breaks down when it is appreciated that not all the defendants' employees are members of the Union – a partnership cannot sue on behalf of some of its members.

The question is whether s. 13 (1) (*d*) of the Trades Union Act gives the Union a right to sue on behalf of its members to enforce the award. The right of a registered trade union to sue under its registered name was first established in the famous *Taff Vale Railway* case (*Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] L.J.K.B. 905), but there the union was suing for wrongful acts against itself. Per Lord Lindley at p. 914: "The use of the name in legal proceedings imposes no duties and alters no rights; it is only a more convenient mode of proceeding than that which would have to be adopted if the same could not be used." Similarly, in *British Motor Trade Association v. Salvadori and Others*, [1949] 1 All E.R. 208, it was held that the plaintiff association was entitled to protect its trade interest against unlawful interferers by maintaining action for conspiracy to procure breaches of contract. Again, in *National Union of General and Municipal Workers v. Gillian and Others*, [1945] 2 All E.R. 593, it was held that the union was entitled to claim for libel affecting its functions and business as a trades union. In *Bobbey v. W. M. Crosbie & Co. Ltd*., [1915] L.J.K.B. 856, it was held that a workman's trade union is entitled to assist him in taking proceedings under the Workman's Compensation Act, 1906, but it may not take proceedings in his name. Although the plaint does not say so, it appears that this is what the plaintiffs are trying to do in this suit. There is nothing to show that the defendants' employees, particularly the non-members of the union, have authorized them to take this step. No case has been cited to me where an individual's right to a sum of money has been enforced by using the name of his union. This does not detract from the union's right to represent its members in negotiations and in the Industrial Court. Here the plaintiffs are asking for a relief that is already provided for in s. 10 of the Act.

It will be seen that the award is couched in general terms. I do not know who are the employees affected by the award. If I granted the relief prayed for and the defendants replied that a particular employee was not in their service at the time, what would be the position then? This is a matter which must be left to the employees.

The suit is misconceived. The plaintiffs have no cause of action.

Suit dismissed.

For the plaintiff:
J Sendege
Kiwanuka & Co, Kampala

For the defendant:
PJ Wilkinson, QC and *JWR Kazzora*
Kazzora & Co, Kampala

Nganga v Kimani
[1969] 1 EA 67 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	25 September 1968
Case Number:	1001/1967 (148/68)
Before:	Harris J
Sourced by:	LawAfrica

[1] Civil Practice and Procedure – Execution – Stay of – Pending appeal – From refusal to set aside ex parte decree – Notice of Motion for stay of execution where no notice of intended appeal has been filed – Amendment of Notice of Motion allowed to include invoking inherent powers of Court – Civil Procedure Act, s. 97 *– Civil Procedure* (*Revised*) *Rules* 1948, *O.* 41, *r.* 4 (*K.*).

Editor's Summary

On October 13, 1967, Mosdell, J. granted an *ex parte* decree to the plaintiff for specific performance by the defendant of an agreement to sell certain land with damages, interest and costs. The draft decree was sent to the defendant for approval in an unregistered letter which the defendant denied receiving; and a formal notice issued to the defendant by the Court about the decree was returned unserved. On November 14, 1967 the Deputy Registrar approved the decree in the presence of the plaintiff's advocates but in the absence of the defendant. On November 15, 1967 the defendant filed a notice of motion before Rudd, J. to have the decree set aside. In support of the motion it was stated that the appropriate Land Board consent to the agreement for sale had been refused on September 1, 1967, and the agreement was therefore null and void for lack of such consent. Rudd, J. treated the application as being made under O. 9, rr. 10 and 24 of the Civil Procedure (Revised) Rules 1948; and he refused to set aside the decree but added that an order to set aside the decree should be dealt with by way of appeal to the Court of Appeal. Under O. 41, r. 4 the defendant filed a notice of motion seeking a stay of execution of the decree pending the determination of an intended appeal by the defendant against the ruling of Rudd, J. refusing to set aside the decree. The plaintiff's advocate took the preliminary objection that no notice of intention to appeal had been filed, whereupon Harris, J. granted leave for the defendant to enlarge the ambit of his motion by an amendment to the effect that it was brought pursuant to the provisions of s. 97 of the Civil Procedure Act in addition to those of O. 41, r. 4.

Held –

(i) the Court has inherent power to grant a stay of exe pending an appeal from a refusal to set aside an *ex parte* decree;

(ii) execution of the decree dated October 13, 1967 should be stayed (on terms) pending the determination, discontinuation or withdrawal of the appeal of which notice had already been filed in Court.

Execution stayed on terms.

No cases referred to in judgment

Judgment

Harris J: This is a motion brought by the defendant under the provisions of O. 41, r. 4 of the Civil Procedure (Revised) Rules, 1948, for an order that execution of an *ex parte* decree granted by Mosdell, J. on October 13, 1967, be stayed pending the hearing and determination of an intended appeal by the defendant against a ruling of Rudd, J. declining to set aside the decree.

In the suit the plaintiff claims specific performance by the defendant of an agreement to sell to the plaintiff certain lands registered as “No. Kiambu/Kanjai/417”. The defendant entered an appearance in person but did not file a statement of defence, and on October 13, 1967, the case came on for hearing *ex parte* before Mosdell, J. in the presence of counsel for the plaintiff and, after the taking of evidence, judgment was entered for the plaintiff and it was ordered that the defendant should transfer the lands to the plaintiff and pay damages, interest and costs.

A draft decree was then prepared by the plaintiff’s advocates and sent for approval to the defendant in an unregistered postal packet addressed to him at a post-office box number identical with that shewn in his memorandum of appearance. There is no evidence that the draft ever reached the defendant and in an affidavit filed by him the defendant, in effect, denies having received the draft decree. A formal notice issued by the registry and addressed to the defendant, requiring him to intimate his approval or disapproval of the draft decree and stating that if he did not do so the matter would be mentioned in chambers before the Deputy Registrar on November 14, was on November 11 returned to the registry unserved owing, it was stated, to the defendant having been found to be away on safari, and on November 14, at the instance of the advocates for the plaintiff and in their presence but in the absence of the defendant, the draft decree as prepared by the said advocates was approved, signed and issued. No question appears to have been raised at any time as to the correctness of this procedure which would seem to conflict with the practice of the Court as laid down in O. 20, r. 7 (2). The defendant says that he did not become aware of the existence of the judgment against him until after the perfecting of the decree.

On December 15, 1967, the defendant through his present advocate filed a notice of motion, supported by an affidavit, seeking to have the decree set aside. The basis of the application was in substance that the agreement for sale between the parties had been expressly made conditional upon the Githunguri Land Board and any other appropriate authority giving their consent to the proposed sale and transfer, which consent the said Board on September 1, 1967, had refused, with the result that the bargain had gone off. The plaintiff filed a number of affidavits in reply and, after further affidavits had been filed by the defendant, the motion came on for hearing on May 15, 1968, before Rudd, J. The learned judge, treating the application as having been made under both r. 10 and r. 24 of O. 9, held that no case had been made out for setting aside the decree under r. 24 and that the matters raised in support of an order under r. 10 could more properly be dealt with by way of appeal to the Court of Appeal against the decree rather than by an application to set it aside, with the result that the application was dismissed. No appeal against the decree appears to have been lodged, but the defendant has filed in this Court a notice of intention to appeal to the Court of Appeal against the ruling of Rudd, J.

At the hearing before me counsel for the plaintiff took a preliminary objection to the effect that an application under O. 41, r. 4 of the Civil Procedure Rules for a stay of execution of a decree pending appeal cannot be granted until at least a notice of intention to appeal against the decree has been filed and that here no such notice has been filed. I upheld this objection but granted leave to the defendant to enlarge the ambit of his motion by an amendment to the effect that it was brought pursuant to the provisions of s. 97 of the Civil Procedure Act in addition to those of O. 41, r. 4.

Thus amended, the present application is for an order, to be made in the exercise by the Court of its inherent jurisdiction, staying the execution of the decree granted by Mosdell, J. pending the hearing of the intended appeal

from the ruling of Rudd, J. In support of the application counsel for the defendant submits, as I understand him, that the intended appeal from that ruling, if brought and if it be successful, will lead directly to a setting aside of the decree, which result, he says, if looked at realistically, is the same as would be obtained by a successful appeal from the decree itself.

Although s. 97 of the Civil Procedure Act is frequently invoked by applicants for the purpose, where all else fails, of satisfying the Court that, apart from the rules, it has jurisdiction to grant their applications, in truth the section does not purport to confer jurisdiction upon the Court and merely preserves unimpaired such inherent power as the Court already possesses dehors the Act to make whatever orders may be necessary to serve the ends of justice or to prevent abuse of the process of the Court. In essence the defendant is here seeking a stay of execution of the decree dated October 13, 1967, while he pursues an appeal, not from that decree, but from a ruling in the same case by a different judge made on May 15, 1968. The application is not covered by the rules and I have not been referred to any precedent for the making of such an order.

The matter may perhaps be fairly approached by a consideration of the position in which the defendant was placed by the granting of the decree of October 13. Seeking to have its effect nullified, he had three remedies to hand, namely, an appeal to the Court of Appeal; an application to this Court to have the decree set aside under O. 9, rr. 10 and 24; and, so long as no appeal had been preferred, an application for review under s. 80 of the Civil Procedure Act. The choice was his and he selected the second course on the basis, presumably, that it was more appropriate in the circumstances than either of the other two, and it is not difficult to see sound reason in his decision. On the other hand, had he chosen to appeal against the decree rather than to seek to have it set aside he would have been entitled under the rules to apply immediately for a stay of execution upon terms to be fixed by the Court on the lines indicated by O. 41, r. 4, and, although the rules governing the making of orders setting aside *ex parte* decrees do not expressly provide for the granting of a stay of execution pending the hearing of an appeal from a refusal to set aside such a decree, I see nothing to suggest that the Court should not inherently have power in its discretion to grant a stay in such a case where it appears to be equitable so to do with a view to temporarily preserving the status quo.

In the present case it is clear that the plaintiff, as holder of the decree, is or may be in a position to proceed thereunder in such a way that substantial loss might result to the defendant notwithstanding that the decree may perhaps ultimately be set aside. This is precisely one of the situations for which, in principle, the granting of a stay of execution is intended to provide, and I am satisfied, therefore, that a stay should be granted subject, if necessary, to the defendant effecting a reasonable measure of security for the plaintiff against any loss which, in the event of the appeal not being proceeded with or not succeeding, he may suffer by reason of the stay.

I therefore direct that execution of the decree dated October 13, 1967, shall be stayed pending the determination, discontinuance or withdrawal of the appeal therefrom to the Court of Appeal of which notice has already been filed in this Court or until further order, and I give liberty to the plaintiff within twenty-one days from this date to apply by summons in chambers on notice to the defendant for an order directing the giving by the defendant of such security as the Court may direct for the due performance by the defendant of such decree, order or judgment of the Court of Appeal or of this Court as may ultimately be binding upon him. I give liberty generally to either party to apply to have this order varied or discharged.

Having regard to all the circumstances of the case, there will be no order for costs.

Order accordingly.

For the defendant/applicant:
Satish Gautama
Satish Gautama, Nairobi

For the plaintiff/respondent:
MTA Malik
AH Malik & Co, Nairobi

Khambi and another v Mahithi and another
[1969] 1 EA 70 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	30 October 1968
Case Number:	18/1968 (149/68)
Before:	Sir Clement de Lestang Ag P, Duffus Ag V-P and Spry JA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Mosdell J

[1] Appeal – Apportionment of liability – Principles on which appeal court will interfere with Judge's apportionment.

[2] Negligence – Collision – Apportionment of liability – Lorry pulling out to pass unlighted parked vehicle at night.

Editor's Summary

The appellants' lorry was stationary on the tarmac on its proper side of the Nairobi-Mombasa road at night without either red tail lights or rear reflectors. The respondents' lorry approached the appellants' lorry from the rear and pulled out to pass it. In so doing it scraped the side of the parked lorry and collided with a motor car travelling in the opposite direction. The trial Judge found the appellants seventy-five per cent. to blame for the accident and the respondents twenty-five per cent.

Held –

(i) an apportionment of liability made by a trial Judge will not be interfered with on appeal save in exceptional cases, as where there is some error of principle or the apportionment is manifestly erroneous (*Brown v. Thompson* (3) and *Shariff v. Sethna* (2) followed);

(ii) the trial Judge had taken into account all material facts and considerations and his apportionment should not be disturbed.

Appeal dismissed.

Cases referred to in judgment:

(1) *British Fame* (*Owners*) *v. MacGregor* (*Owners*), [1943] 1 All E.R. 33.

(2) *Shariff v. Sethna*, [1963] E.A. 239.

(3) *Brown v. Thompson*, [1968] 2 All E.R. 708.

October 30, 1968. The following considered judgments were read:

Judgment

Sir Clement De Lestang Ag P: This is an appeal between joint tortfeasors against the apportionment of blame to each of them by the trial judge, Mosdell, J., in the High Court of Kenya sitting in Mombasa. The facts giving rise to the appeal may be briefly stated.

At about 8 p.m. on March 1, 1966, a Mercedes Benz motor car was travelling from Nairobi to Mombasa on the Nairobi/Mombasa road. At the same time

a Fiat lorry with a trailer belonging to the second respondent was being driven from Mombasa to Nairobi on the same road by its servant, the first respondent. There also happened to be parked on the same road facing Nairobi a lorry belonging to the second appellant under the care of the first appellant its driver and servant of the second appellant. It had neither red tail lights nor rear reflectors and was parked wholly or almost wholly on the tarmac on its proper side of the road although it could easily have been parked on the verge of the road. As the Mercedes and the Fiat Lorry approached each other from opposite directions with their lights on, the latter vehicle pulled over to its offside in order to overtake the parked lorry. In so doing the Fiat lorry scraped the offside of the parked lorry and collided with the Mercedes as a result of which the lorry caught fire and the Mercedes became a total loss. The learned judge held the drivers of both lorries negligent and apportioned their blame at seventy-five per cent. in the case of the parked lorry and twenty-five per cent. in the case of the Fiat lorry. It is against the apportioning of blame to the parked lorry that the appellants appeal. The owner of the Mercedes car, who was plaintiff in the court below, was held to be completely blameless and is not a party to this appeal.

It is well settled that where a trial judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial judge (*Brown v. Thompson*, [1968] 2 All E.R. 708, in which the previous authorities are referred to in particular *British Fame* (*Owners*) *v. MacGregor* (*Owners*), [1943] 1 All E.R. 33). The same principle was followed in *Shariff v. Sethna*, [1963] E.A. 239, a decision of this Court.

Mr. Mackie-Robertson for the appellants strongly argued that in arriving at his apportionment in the present case the learned judge erred in that he failed to infer from the evidence that the Fiat lorry was travelling much faster than its driver admitted, the inadequacy of the headlights of that vehicle, and the fact that if its lights had been adequate it ought to have picked out the parked lorry in its headlights a long way away. He also contended that the learned judge ought to have accepted the evidence of a witness who stated that he was with the parked lorry and waved a lighted torch at the on-coming Fiat lorry to indicate its presence on the road.

Mr. M. Satchu who appeared for the respondents pointed out that not only was it not pleaded in the particulars of negligence that the lights of the Fiat lorry were inadequate or defective but that the uncontradicted evidence on the record was to the effect that the lights were in good condition. He also contended that the proper speed at which the Fiat lorry was travelling was borne out by the uncontradicted evidence of an expert witness and that the driver of the Fiat lorry was unable to pick out the parked lorry because, as he said, he was dazzled by the lights of the oncoming Mercedes.

The learned trial judge made no express finding on the speed at which the Fiat lorry was travelling nor on the condition of its lights but reading his judgment as a whole he seems to have been satisfied on both these matters as he accepted the version of the accident given by its driver.

It seems to me also that the learned judge cannot be criticised for not accepting the evidence of the witness about the waving of a torch for the reasons he gave and in view of the evidence of the driver of the Fiat lorry, which he accepted, that the parked lorry was unattended at the time and its driver only arrived on the scene fifteen minutes later whereas the witness had said that he was sitting in the cab.

I am not convinced that the learned judge in the present case failed to give effect to some material fact or to take into account some material consideration in which case only would it be right for this Court to intervene. It may well be that had I been trying this case I might have apportioned the blame slightly differently but this is no good reason to interfere with the assessment made by the learned judge.

I would accordingly dismiss this appeal with costs and as Duffus, Ag. V.-P., and Spry, J.A. also agree it is so ordered.

Duffus Ag V-P: I agree.

Spry JA: I also agree.

Appeal dismissed.

For the appellants:
JA Mackie-Robertson, QC and *CR Doshi*
Patel and Thakkar, Mombasa

For the respondents:
M Satchu
Atkinson, Cleasby and Satchu, Mombasa

Barugahara v Uganda
[1969] 1 EA 72 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	4 November 1968
Case Number:	324/1968 (151/68)
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Appeal – Corroboration – Duty of Appeal Court to consider whether there was corroboration of witness.

[2] Criminal Law – Incest – Whether legitimate relationship required.

[3] Evidence – Corroboration – Whether evidence of female witness liable to be prosecuted for incest requires corroboration.

Editor's Summary

The appellant was convicted of incest with his daughter under s. 144 (1) of the Penal Code of Uganda.

He had married seventeen years before in Kampala and his wife went home to Toro when six months pregnant. When his daughter was twelve years old she came to live with him and they lived alone. The daughter became pregnant and the child was born alive. The appellant tried to allege that he had not married and that the woman was not his daughter, although he subsequently admitted that he knew she was his daughter and also that they had lived alone together for a considerable time and that it was during this time that she became pregnant.

Held –

(i) the offence of incest is committed even if the relationship is not traced through lawful wedlock;

(ii) the evidence of a female witness liable to be prosecuted for incest requires to be corroborated;

(iii) since the magistrate had not directed himself that corroboration was required of the evidence of an accomplice, the appeal court must consider any corroborative evidence. As there was ample evidence to corroborate the evidence of the accomplice, the conviction would be affirmed.

Appeal dismissed.

Cases referred to in judgment:

(1) *Makin v. The Attorney-General of New South Wales*, [1894] A.C. 57.

(2) *D.P.P. v. Ball and Ball* (1911), 6 Cr. App. Rep. 31.

(3) *R. v. Bloodworth* (1914), 9 Cr. App. Rep. 80.

Judgment

Sir Udo Udoma CJ: This appeal is against the judgment and order of the Magistrate Grade I Magistrate's Court Toro. The appellant, Nserimi Barugahara, was convicted of incest under s. 144 (1) of the Penal Code and sentenced to two years' imprisonment.

The facts of the case were briefly that Bacwenkojo was seventeen years ago married to and cohabited with the appellant as husband and wife in Kampala. Three months thereafter Bacwenkojo became pregnant and so informed the appellant. That information was confirmed to be correct when, at the request of the appellant, Bacwenkojo was medically examined at the Mulago hospital.

When the pregnancy was six months old Bacwenkojo decided to go home to Mirango in Toro for the delivery of the baby. Subsequently the baby, which turned out to be a daughter, was born at Toro. She was named Kirabakona Kabaganda and was born during wedlock as the marriage between the appellant and Bacwenkojo was still subsisting.

After the birth of Kirabakona Kabaganda Bacwenkojo went with her to and was living with one Baheka. When however Kirabakona Kabaganda was twelve years old the appellant went to the house of Baheka and brought her to live with him as her father. Baheka did not raise any objection. Thereafter the appellant continued to live with the daughter, Kirabakona Kabaganda. Both of them were living alone in the house. In the course of their living together alone the appellant became fond of and intimate with his daughter. He used to have sexual intercourse with her. The result was that Kirabakona Kabanda became pregnant. Later a child was born. The child however died nineteen days after birth. But before the death, it became known that the appellant was responsible for the pregnancy.

It was common knowledge in the area that the appellant was living alone with his daughter for seven years and the appellant himself made no secret of it; and, in particular, after the delivery of the child by Kirabakona Kabaganda the appellant announced the fact at a beer party held in the house of Augustine Nyamayarwo.

Before the pregnancy Kirabakona Kabaganda had complained on a number of occasions to her mother that the appellant used to have sexual intercourse with her. Following upon such a complaint Bacwenkojo confronted the appellant with the accusation; and, on that occasion, the appellant threatened to beat her. She became frightened and dared not mention the matter again to the appellant.

In his defence the appellant said that Bacwenkojo was never his wife. He met her in Kampala as a prostitute in 1949 and befriended her. He did not know nor did she tell him that she had no (sic) husband. They however cohabited and used to have sexual intercourse together. After three months Bacwenkojo informed him that she was pregnant. She was examined at the Mulago hospital and the pregnancy was confirmed. When she was six months pregnant she insisted on going home for the delivery of the child, which she did.

The child turned out to be a daughter, namely Kirabakona Kabaganda. The mother later went and lived with her husband, Baheka with whom she had lived before for six years.

On the birth of Kirabakona Kabaganda the appellant sent the customary gifts to Bacwenkojo, but the latter refused to accept the gifts and told him that he was not the father of Kirabakona Kabaganda; that he was not responsible for her pregnancy at Kampala; and that she was not speaking the truth then when she told him that he was the father of her unborn child.

When Kirabakona Kabaganda the daughter was eleven years old, in response to the invitation of the father of Bacwenkojo he went to the latter's house for the purpose of settling the dispute between himself and Bacwenkojo as to the paternity of Kirabakona Kabaganda. At the sight of him Bacwenkojo chased him away from the house; and he was compelled to return home without even being afforded the opportunity of discussing the matter. A year later however his other daughter, Kojonia, visited Kirabakona Kabaganda and returned with her to the appellant's house. Kirabakona Kabaganda was then twelve years of age.

The appellant said that on seeing Kirabakona Kabaganda at his house, his first reaction was to send her back to her mother; but on the intervention of his father he allowed her to stay, and thereafter he was living together with her. Soon thereafter Bacwenkojo came together with one Kisembo and complained to him that the daughter, Kirabakona Kabaganda had reported to her that he had been having sexual intercourse with her. The mother, despite the complaint, decided to leave the daughter with him, which she did.

Subsequently Bacwenkojo visited him and there found that her daughter was pregnant; and later she was delivered of a child. The appellant later admitted that Kirabakona Kabaganda was his daughter and that she became pregnant at the age of fifteen years. He denied that the child of which she was delivered was his own child; and that before the birth of the child his daughter ever told him that he was responsible for her pregnancy.

The learned trial Magistrate disbelieved the evidence of the appellant, accepted the case of the prosecution and whereupon convicted the appellant.

In his petition of appeal, the appellant attacked the judgment of the learned trial Magistrate on the grounds (1) that there was no corroboration of the evidence of his daughter that he had had sexual intercourse with her; (2) that it was not true that Kirabakona Kabaganda was his daughter; (3) and that the judgment cannot be supported having regard to the evidence.

The most important issue which has been raised in this case is the issue of corroboration. The learned trial Magistrate failed in his judgment to have directed his mind to that issue at all. He merely accepted the evidence of the witnesses for the prosecution and thereupon convicted the appellant. He failed to warn himself of the danger of a conviction on the uncorroborated evidence of an accomplice.

That being so, it is the duty of this court to see whether there was evidence corroborative of the evidence given by Kirabakona Kabaganda. At first the appellant had denied that Kirabakona Kabaganda was his daughter; but later in the course of his evidence he admitted that he knew that she was his daughter. Evidence was given by Petero Mulindwa that the appellant had always treated Kirabakona Kabaganda as his wife. They both had lived together for a considerable length of time in the same house and under the same roof. The appellant also admitted that they both had been living together alone for a considerable time and that it was during the period that they were living together that Kirabakona Kabaganda became pregnant. The appellant also admitted that Kirabakona Kabaganda did complain to her mother and Kisembo to his knowledge and hearing that he used to have sexual intercourse with her, which had resulted in her pregnancy and the birth of a child. The child lived for only nineteen days.

In opposing this appeal Mr. A. M. Khan, State Attorney, submitted that on the principle laid down in *D.P.P. v. Ball and Ball* (1911), 6 Cr. App. 31 there was ample evidence corroborative of the evidence of Kirabakona Kabaganda that the appellant was guilty of the offence charged as there was sufficient opportunity for the offence.

In *D.P.P. v. Ball and Ball* it was laid down that, on an indictment for incest on certain dates, evidence of conduct at an earlier date tending to prove that the parties had gratified a mutual passion is admissible as relevant to the issues raised on the indictment and to rebut the defence that the relations between the parties were innocent.

The decision of the House of Lords in that case was based on *Makin v. The Attorney-General of New South Wales*, [1894] A.C. 57.

In *R. v. Bloodworth* (1914), 9 Cr. App. Rep. 80 the decision in *Ball* was followed and explained. It was laid down that the rule as to the corroboration of the evidence of accomplices applies to female witnesses who may be liable to prosecution under the Incest Act, 1908.

The relevant passage of the judgment of the Court of Criminal Appeal deals with admissible evidence. In the judgment of the Court, delivered by Ridley, J. we find this passage:

> "The other point taken is that evidence as to July, 1940, ought not to have been admitted. The matter turns on Ball, which was quoted at the trial . . . In that case there was no doubt that a brother and sister were occupying the same bedroom, and evidence was given by other people to show that such occupation was not of an innocent character; there was some evidence that they had had a child. Here the evidence was by the girl herself, but the cases do not differ on this point, that two people were in bed together . . . and the question was whether there was evidence to show that they were there for sensual purposes, and the evidence in question was held to be material for that purpose. Avory, J. said that if there was corroboration of the fact that the girl was in bed with her father the evidence was relevant to show whether it was probable that connection took place."

In the instant case there was certainly ample evidence corroborative of the evidence of Kirabakona Kabaganda that sexual intercourse did take place between the appellant and her. The birth of the child which died nineteen days after birth was not denied. On the contrary the appellant was endeavouring to justify his conduct in having had illicit intercourse with Kirabakona Kabaganda by denying at first his paternity of the girl. In his evidence he swore that when he tried to claim Kirabakona Kabaganda as his daughter that claim was resisted by the mother; and furthermore that Bacwenko was a prostitute he found in Kampala. In other words that she was not his wife at all. On the other hand he admitted that the woman was pregnant within three months of their sharing the same house and bed. Even if it were true that the appellant was not legally married to Bacwenkojo which, on the evidence accepted by the Magistrate, is not the case, the appellant would still be held guilty under the provisions of s. 146 of the Penal Code, which are in the following terms:

> "146. In the two last preceding sections the expressions 'brother' and 'sister' respectively include half brother and half sister, and the provisions of the said Sections shall apply whether the relationship between the person charged with an offence and the person with whom the offence is alleged to have been committed is or is not traced through lawful wedlock."

This appeal is dismissed as there was ample evidence to support the conviction of the appellant. Had the Magistrate correctly directed himself on the issue

of corroboration, he would have come to the same decision as he had to come to in the absence of such direction. The conviction and sentence are confirmed.

Appeal dismissed.

Appellant unrepresented.

For the respondent:
AM Khan (State Attorney, Uganda)
Director of Public Prosecutions, Uganda

Patel v National and Grindlays Bank Ltd
[1969] 1 EA 76 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	8 November 1968
Case Number:	239/1967 (153/68)
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Banking – Cheque – Wrongful dishonour of by Bank – Damages for – Basis of action – Whether damage presumed – Whether punitive or exemplary damages can be awarded – Measure of damages.

[2] Damages – Cheque – Wrongful dishonour – Measure of.

Editor's Summary

The plaintiff, a shopkeeper in Busia, claimed damages from the defendant Bank which had wrongfully dishonoured two of his cheques although his account was in credit. He himself had been sued in respect of one of the cheques, his credit-worthiness had suffered and it was not till he moved to Arua that he was able to trade successfully.

Held –

(i) the action lies in contract with a presumption that a trader's credit will be affected if his cheques are wrongfully dishonoured; and without proof that entitles him to more than nominal damages;

(ii) punitive or exemplary damages cannot be awarded.

Judgment for the plaintiff for Shs. 2,150/- and interest.

Cases referred to in judgment:

(1) *Marzetti v. Williams* (1830), 1 B & Ad. 415; 109 E.R. 842.

(2) *Rolin v. Steward* (1854), 14 C.B. 595; 139 E.R. 245.

(3) *Prehn v. Royal Bank of Liverpool* (1869 – 1870), 5 L.R. Ex. 92.

(4) *Wilson v. United Counties Bank Ltd*., [1920] A.C. 102.

(5) *Vanbergen v. St. Edmond's Properties Ltd*., [1933] 1 K.B. 345.

(6) *Groom v. Crocker*, [1939] 1 K.B. 194.

(7) *Gibbons v. Westminster Bank Ltd*., [1939] 3 All E.R. 577.

(8) *Davidson v. Barclays Bank Ltd*., [1940] 1 All E.R. 316.

(9) *Soonasra v. Standard Bank of South Africa Ltd*. (1953), 7 U.L.R. 41.

(10) *Rookes v. Barnard*, [1964] 1 All E.R. 367.

(11) *Salem Bin Kassim v. Barclays Bank D.C.O*. (E.A.C.A. Civil Appeal No. 37 of 1967) (unreported).

Judgment

Sheridan J: The plaintiff claims damages for breach of contract.

In 1966 he was a shopkeeper at Busia. In February, 1966 he opened an account with the defendant bank at Tororo. On March 30, 1967 he drew a cheque

for Shs. 312/- in favour of Haji Mitha & Co. Ltd. On April 3 this cheque was dishonoured and marked "Refer to Drawer". On May 4 he drew a cheque for a similar amount in favour of Simba Clothing Factory Ltd. This cheque was also dishonoured. On May 15 they wrote him a letter pointing out the fact. In it they upbraided him for allowing a cheque for a small amount to be dishonoured, contrary to business practice. The plaintiff gave evidence that he received this letter on about May 20. At about the same time he received a summons from Haji Mitha & Co. Ltd. claiming Shs. 612/- including the dishonoured cheque for Shs. 312/-. Immediately he rang up the bank but he was told to return after the week-end as it was near closing time on a Saturday. On Tuesday, May 23, he saw Mr. Trivedi, the defendants' broker, who realized that a mistake had been made over a confusion between the plaintiff's name and that of another customer with similar initials and surname. The plaintiff's account was about Shs. 1,400/- in credit. He rang up Haji Mitha's office at Mbale, but there was no responsible clerk there. On Wednesday, May 24, the plaintiff saw the defendants' advocate at Mbale. He tendered Shs. 312/- but it was not accepted as Shs. 175/- lawyer's fees was also being claimed. This claim was subsequently settled by the defendants. On May 31 and June 2 the defendants had written to the addressees, pointing out the mistake they had made and expressing a hope that the plaintiff's credit-worthiness had not been impaired.

In their written statement of defence the defendants plead contributory negligence and failure to mitigate damages by the plaintiff. I do not agree. The plaintiff, a small trader, had done the best he could to bring home to the defendants the mistake which they had made. His credit must have suffered. Kalyanji Popatlal Soni, a goldsmith and Court Broker in Mbale, happened to be in Mitha's advocates' office when the plaintiff came to try and settle the claim. Whereas he had been ready to give him credit for the purchase of jewellery in January, he refused to do so in June. It does not affect the matter that these were personal purchases. To quote from *H. N. Soonasra v. Standard Bank of South Africa Ltd.* (1953), 7 U.L.R. 41, per Ainley, J. at p. 42:

> "On the other hand, some evidence has been given to indicate how far news that a trader's cheque has been dishonoured can travel. I need little convincing of that. Moreover, the majority of traders of the plaintiff's class do much business on credit, and the obvious result of an occurrence such as this is that credit will tend to be withdrawn."

The defendants relied on the dishonour of two of the plaintiff's cheques for Shs. 194/30 and Shs. 100/- in 1966 as showing that his business credit was already at a low ebb, but there were special circumstances surrounding these cheques which the defendants do not now dispute. The cheque for Shs. 100/-was to accommodate a friend who had promised to put him in funds. He was only slightly overdrawn in regard to the cheque for Shs. 194/30 because he had overlooked the fact that he had been charged a ledger fee of Shs. 7/50.

Mr. Belk, for the defendants, submits that this is in the nature of a test case on the measure of damages to be awarded in the case of a trader's dishonoured cheque, and with commendable industry he has taken me through the English authorities – often conflicting as to whether they are to be estimated on the ground that the case is based on tort or on breach of contract. *Soonasra's* case (*supra*) was decided in 1956, and the only other similar case in Uganda was decided in 1964. The judgment was reversed by the East African Court of Appeal in *Salem Bin Kassim v. Barclays Bank D.C. & O.* (Civil Appeal No. 37 of 1967) (unreported). At the same time I appreciate that similar claims may have been settled out of Court, bearing in mind a bank's reluctance to litigate.

While declining Mr. Belk's invitation to give an authoritative ruling I will, in deference to his industry, shortly consider the authorities.

In *Marzetti v. Williams* (1830), 109 E.R. 842 it was stated that although the action was in form founded in tort, it was in substance founded on a contract between the banker and his customer that he will pay cheques drawn by him, provided that he, the banker, has money in his hands belonging to the customer. Even if the plaintiff had not sustained any damage, he would be entitled to nominal damages. Lord Tenterden, C.J., at p. 845 goes on:

> "At the same time I cannot forbear to observe, that it is a discredit to a person, and therefore injurious in fact, to have a draft refused payment for so small a sum, for it shows that the banker has very little confidence in the customer. It is an act particularly calculated to be injurious to a person in trade."

In *Rolin v. Steward* (1854), 139 E.R. 245, Cresswell, J. elaborated on this and said at p. 250:

> "His Lordship, therefore, assumes as a thing not to be disputed, that a breach of contract of this sort must of necessity be injurious to a person in trade; and if so, the jury might properly take that into consideration and give damages accordingly."

In that case, which was decided in 1854, the plaintiff had £9,000 in his account and three cheques for £48, £111 and £900 were dishonoured. These were substantial breaches of contract. On appeal a jury award of £500 was reduced to £200. The direction of the trial judge that they should not limit their award to nominal damages but should give the plaintiffs such temperate damages as they should judge to be reasonable compensation for the injury they must have sustained from the dishonour of their cheques was upheld. This was followed by *Prehn v. Royal Bank of Liverpool*, 5 L.R. Ex. 92 where at p. 99, Kelly, C.B. said "And further if the bills had simply been dishonoured, and the plaintiffs had brought their action, then, without proof of any special damage, the jury would, on the principle of *Rolin v. Steward* and *Marzetti v. Williams*, have been entitled to consider all the probabilities and circumstances of the case, and to give reasonable damages accordingly". I read that passage as referring to commercial probabilities, and not to hurt feelings at having a cheque dishonoured.

In *Groom v. Crocker*, [1939] 1 K.B. 194, it was held that in the case of breach of duty by a solicitor no damages should be awarded for injury to feelings and reputation.

Where a banker dishonours a cheque when the customer's account is in funds, it is the commercial credit of the customer that is injured, and the inference arises that pecuniary loss will necessarily ensue. In *Vanbergen v. St. Edmond's Properties Ltd*., [1933] 1 K.B. 345, where a bankruptcy notice was wrongly served on a trader, Macnaghten, J. said at p. 348:

> "With regard to damages, I do not think that the cases with regard to contracts for the sale of goods have any bearing on a case such as this. The plaintiff is a trader, and the service of a bankruptcy notice on a trader, if effected in any such circumstances of publicity as the jury have found in this case, is an act which would very likely affect the credit of the trader. In my view those cases are apposite in which it has been held that if a banker, with funds in his hands belonging to a customer, dishonours a cheque drawn by the customer, he is liable to substantial damages to the customer for breach of contract. *Rolin v. Steward* is one of a number of cases to that effect. The damages, as Lord Campbell directed the jury in that case, must not be excessive. They must be reasonable and temperate."

In that case a jury award of £500 was held not to be excessive. A jury, unlike a judge sitting alone, would be more inclined to give vent to its personal feelings and to make more liberal awards. In *Davidson v. Barclays Bank Ltd*., [1940] 1 All E.R. 316, Hilbery, J., sitting alone, awarded £250 damages to a credit bookmaker whose cheques for £2 15s. 8d. and £7 15s. 9d. had been dishonoured owing to a mistake by the defendant bank. If a non-trader has his cheque dishonoured he is entitled only to nominal damages: *Gibbons v. Westminster Bank Ltd*., [1939] 3 All E.R. 577. Punitive or exemplary damages cannot be awarded in these cases: *Rookes v. Barnard*, [1964] 1 All E.R. 367. Lord Devlin (ibid. at p. 410) contrasts oppressive action by servants of the government with oppressive action by private corporations, and would not extend the award of punitive damages to the latter.

Coming nearer to home, in *Soonasra* the plaintiff was an Indian shopkeeper in Fort Portal. On November 23, 1952 he drew a cheque for Shs. 5,000/-in favour of A.R., a trader in Masindi. Although there were sufficient funds to meet it the defendant bank, through an error, did not honour it but returned it to A.R. marked "Refer to drawer". Not unlike the present case, the defendants, by their negligence, credited money paid in by the plaintiff to the account of a man having a similar name. The plaintiff sued for damages for libel and for breach of contract. The learned judge held that the question of libel or no libel did not really matter because the fact was that the defendants had been guilty of a breach of duty to their customer, and that from that breach damages very clearly flowed. Taking this into consideration, and the apparent status of the plaintiff, he assessed damages at Shs. 2,200/-. In so far as the learned judge sought to equate contract and tort in assessing damages, I would respectfully disagree. The English authorities point to the action lying in contract with a presumption that a trader's credit will be affected if his cheques are wrongfully dishonoured and without proof that entitles him to more than nominal damages.

In *Kassim* the plaintiff was a businessman in a good way of business in Soroti. Arising out of a sale of cement in the Sudan, in 1963, his account with the defendant bank was wrongly debited with Shs. 20,000/-, with the result that two of his cheques totalling Shs. 16,375/- were dishonoured. De Lestang, Ag. V.-P., in allowing the appeal, said on this aspect of the case:

> "The appellant is a trader and there can be no doubt that the dishonouring of his cheques must have injured his credit and reputation to some extent. He neither alleged nor proved any special damages, but in the case of a trading customer general damages may be awarded for injury to his credit and reputation without proof of special damage (*Rolin v. Steward, supra*; *Wilson v. United Counties Bank Ltd*., [1920] A.C. 102). Having regard to the fact, however, that the appellant was able, upon notification of dishonour by the payee of the cheques, to issue another cheque on another account of his which was duly met, the injury to his credit and reputation cannot have been great. In all the circumstances, I would assess the damages at Shs. 2,000/-."

On the authorities I take "reputation" to refer to commercial reputation.

Although the present plaintiff was in a much smaller way of business – he valued his stock-in-trade at Shs. 15,000/- – his credit was all the more vulnerable. The damage to his credit was more widely broadcast and more protracted. Legal proceedings were taken against him. He states that it was not until he shifted his business to Arua, this year, that he was able to trade again successfully. I think that a temperate award in 1968 and in all the circumstances of the case, including the absence of concrete evidence of the extent to which his credit was injured, would be Shs. 2,000/-.

The plaintiff's claim for special damages of Shs. 150/- – Shs. 50/- for three days when he had to close his shop when he travelled to Tororo and Mbale – is

not disputed. In evidence he stated that he paid his advocate Shs. 200/- to defend the suit brought against him by Haji Mitha, but this sum is not claimed in the plaint. There will be judgment for the plaintiff for Shs. 2,150/- with interest.

Judgment for the plaintiff.

For the plaintiff:
DD Shah
DD Shah, Mbale

For the defendant:
CTS Belk
Hunter & Grieg, Kampala

Peter & Co Ltd v Mangalji and others
[1969] 1 EA 80 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	11 November 1968
Case Number:	62/1968 (154/68)
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Civil Practice and Procedure – Parties – Joinder – Of defendants – Different facts – Whether distinct transactions – Civil Procedure Rules, O. 1, *r.* 3 (*U.*).

Editor's Summary

The plaintiffs sued the first defendant for damages for breach of two Management Agency Agreements, alleging *inter alia* that he had improperly caused a debenture over the plaintiffs' assets to be transferred to the family firm in which he was a partner. The plaintiff joined the second defendant, who was the receiver and manager appointed some years later under the debenture, as a party alleging against him that he had mismanaged the assets and had made a secret profit. These two defendants took the preliminary objection that they had been improperly joined, the transaction upon which they had been sued being separate and distinct.

Held – the second defendant could not properly be joined as a defendant in this suit.

Preliminary objection upheld.

Cases referred to in judgment:

(1) *Payne v. British Time Recorder Ltd. and Another*, [1921] 2 K.B. 1.

(2) *Compania Sansinena De Carnes Congeladas v. Houlder Bros. & Co. Ltd. and Another*, [1910] 2 K.B. 354.

(3) *Uganda Trading Co. Ltd. v. Jinja Cash Stores Ltd. & Another*, [1965] E.A. 469.

Judgment

Sheridan J: Mr. Haque, for the remaining two defendants, has taken the preliminary point that they have been improperly joined, not in accordance with the Civil Procedure Rules, O. 1, r. 3; and that there should be separate suits or the plaintiffs should be made to elect against which defendant they wish to proceed in the present suit.

The plaintiffs are suing the first defendant for damages for breach of two Management Agency Agreements and for an account to be taken. The amended plaint contains twenty-three paragraphs. After the first fifteen paragraphs, which aver mismanagement by the first defendant in the conduct of the plaintiffs' affairs, he disappears from the picture.

It is alleged against him that contrary to Cl. 8 of the Management Agency Agreement, which debarred him from having any debenture on the plaintiffs' assets, on May 30, 1960 he caused a debenture which the plaintiffs had issued in favour of Barclays Bank Ltd. to be transferred to the family firm in which he was one of the partners. On June 9, 1961 he ceased to be a partner. On October 31, 1961 he ceased to be interested in the debenture when it was transferred to a newly constituted family firm.

Paragraph 16 of the plaint avers that on June 30, 1967 the debenture holders demanded their money – I am told it is about Shs. 1,000,000/- – and on failure by the plaintiffs to pay, took the plaintiffs into receivership and on July 1, 1967 appointed the second defendant as receiver and manager. On September 1, 1967 the second defendant appointed the third defendant – who has been dismissed from the suit – and another as his agents. Paragraphs 16 to 21 of the plaint aver mismanagement by the second defendant, but the prayer confines itself to asking for another receiver and manager to be appointed.

In considering O. 1, r. 3 the Court must be satisfied:

(1) that the right to relief in respect of, or arising out of the same act or transaction or series of acts or transactions, is alleged to exist, whether jointly or severally; or

(2) the suit is one where, if separate suits were brought against such persons, any common question of law or fact would arise.

Can it be said that the second defendant's appointment in 1967, as receiver under the debenture, had anything to do with the activities of the first defendant's managing agent which started in 1961? Mr. Haque submits that they are separate distinct transactions.

In para. 22 (*c*) it is alleged that as receiver he has made some secret profit at the expense of the plaintiffs. This is something apart from the damages claimed from the first defendant for breach of agreements. The only connecting link appears to be that it is alleged to have place during the management of the plaintiffs' affairs. The claim against the second defendant appears to be somewhat nebulous. No particulars are vouchsafed. Nor is there any common question of law or fact involved.

Mr. Binaisa, for the plaintiffs, submits that while the defendants may have fulfilled the legal formalities, you have only to peer behind the curtain to see the machinations of the first defendant, his family firm, the debenture holders and the appointment of one of them by the second defendant as his agent, to realize that the defendants have bound the plaintiffs hand and foot. It was mismanagement by the first defendant that caused the second defendant to be appointed as receiver. I am unable to see the nexus here. The appointment of the second defendant as receiver had nothing to do with the first defendant. The validity of the appointment is not questioned. The evidence that the first defendant had caused the plaintiffs loss by his bad advice will be distinct from the evidence that the second defendant, as receiver, had made a secret profit. If the first defendant is held to be liable, that will not make the second defendant, as receiver appointed by the debenture holders, liable. The authorities cited by Mr. Binaisa – *Payne v. British Time Recorder Ltd*., [1921] 2 K.B. 1, and *Compania Sansinena De Carnes Congeladas v. Houlder Bros. & Co. Ltd*., [1910] 2 K.B. 354 – do not help him because they deal with the joinder of different causes of action which is specifically provided for by our O. 2, r. 2 (1). But this rule is prefaced by the words "Save as otherwise provided" and O. 1, r. 3, does provide otherwise. I confess that I do not find these questions of joinder of defendants easy to resolve: see *Uganda General Trading Co. Ltd. v. Jinja Cash Stores Ltd*.,

[1965] E.A. 469, but here I do not think that the second defendant could properly be joined as a defendant in the present suit.

Order accordingly.

For the plaintiffs:
GL Binaisa, QC and *PM Mitha*
Binaisa & Co, Kampala

For the first and second defendants:
Z Haque
Haque & Gopal, Kampala

Ngocho v Republic
[1969] 1 EA 82 (HCT)

Division:	High Court of Tanzania at Mwanza
Date of judgment:	13 May 1968
Case Number:	975/1967 (157/68)
Before:	Seaton J
Sourced by:	LawAfrica

[1] Criminal Law – Impeding, preventing or defeating any self-help scheme – Certificate of the Regional Commissioner to be conclusive proof of approval of scheme – No certificate produced – Section 89 *C, Penal Code* (*Cap.* 16) (*T.*).

[2] Criminal Practice and Procedure – Impeding, preventing or defeating any self-help scheme – Certificate of the Regional Commissioner to be conclusive proof of approval of scheme – No certificate produced – Section 89 *C, Penal Code* (*Cap.* 16) (*T.*).

Editor's Summary

The appellant was convicted of the offence under s. 89 C of the Penal Code, of impeding, preventing or defeating any self-help scheme approved by the Regional Commissioner. In terms of s. 89 C (2), in any prosecution for an offence under the section, the certificate of the Regional Commissioner of his approval of the scheme in question, shall be conclusive proof of such approval. No certificate of the Regional Commissioner was produced and the prosecution relied on adducing evidence of such approval from the headman of the area. Section 89 C (1) also requires proof of "an intent to impede, obstruct, prevent or defeat" a self-help scheme, before a conviction can be sustained.

Held –

(i) the magistrate had misdirected himself as to whose testimony purported to establish the requisite approval of the Regional Commissioner;

(ii) the magistrate had made no express finding in his judgment that the appellant had the requisite intent to sustain a conviction.

Appeal allowed and conviction quashed.

Cases referred to in judgment:

(1) *Re Dudley Tram Co*. (1893) 63 L.J.Ch. 108.

Judgment

Seaton J: The appellant was formerly a member of the North Mara District Council. Having left that position, he was asked by the first prosecution witness for a cash sale receipt which had been received by him in connection with a local self-help scheme started in 1961, namely, building a school. The appellant, in reply to the first prosecution witness, told him that the school would be of no value and he had burnt the receipts. The appellant

also told the first prosecution witness that the latter should not go to the self-help scheme. The appellant subsequently made similar remarks to fourth prosecution witness when the latter accosted him and questioned whether it was true that he had spoken such disparaging remarks to first prosecution witness. The appellant also told second prosecution witness that "there is no value to attach somebody's property to be eaten free while no development at all."

The third prosecution witness, the headman of Mbogi area, testified that there is a school-building self-help scheme in his area. Both the first and second prosecution witnesses testified that the project was approved by the Area Commissioner in 1964 although the school building was started as early as 1961. The appellant, who did not challenge this, gave evidence denying that he had made the remarks attributed to him by the prosecution witnesses and asserting that they were falsifying evidence against him because he had fought with the brother of the first prosecution witness. There was undisputed evidence that the appellant's wife and children participated in the self-help scheme. Appellant's testimony was supported by two defence witnesses.

On the above evidence and that of three other prosecution witnesses who heard appellant's remarks to the first prosecution witness the appellant was convicted of an offence under s. 89 C of the Penal Code and sentenced to eight months' imprisonment. As the offence created by this section is a novel one and somewhat difficult to interpret, this appeal was heard despite the unfortunate fact that the appellant has already been released after serving his sentence.

Section 89 C has two subsections which read as follows:

> "(1) Any person who, with intent to impede, obstruct, prevent or defeat any self-help scheme approved by the Regional Commissioner or the Area Commissioner or any self-help scheme of a type approved by the Regional Commissioner or the Area Commissioner, dissuades or attempts to dissuade any person from offering his services, or from assisting, in connection therewith, shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand shillings, or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment.
>
> (2) In any prosecution for an offence against this section, the certificate of the Regional Commissioner or the Area Commissioner, as the case may be, that a self-help scheme named or described therein was approved by him on a specified date or that self-help schemes of the type described therein were approved by him on or before a specified date, shall be conclusive evidence of such facts."

It will be seen from the above-quoted sub-s. (2) that the certificate of the Regional Commissioner or Area Commissioner shall be "conclusive evidence" of the approval of the self-help scheme. In this case, no such certificate was produced but the learned magistrate took "judicial notice" of the fact of the Area Commissioner's approval from the evidence of the headman, the third prosecution witness. The learned magistrate has misdirected himself on this point, because nowhere in the evidence of the third prosecution witness is there mention of the Area Commissioner's approval. It is in the testimony of the first and second prosecution witnesses that such approval is asserted. However, since such testimony was admitted, the question arises whether any other kind of evidence may be substituted for the certificate of the Regional Commissioner or Area Commissioner, albeit of a rebuttable character.

State Attorney, who does not support the conviction, is of the opinion that a certificate of the Regional or Area Commissioner is indispensable to prove the fact of approval. In Stroud's Judicial Dictionary (2nd Edn.), pp. 362 – 363,

"conclusive evidence" of a fact is absolute evidence of such fact, as well criminally as civilly, for all purposes for which it is so made evidence and such evidence cannot be challenged by contradictory evidence. Support for State Attorney's contention seems to be provided by the case of *Re Dudley Tram Co.*, 63 L.J. Ch. 108, cited by Stroud (at p. 363) where Kekewich, J., held that the Certificate of Incorporation of a company, which, by s. 18 of the Companies Act, 1862, was "conclusive evidence" of its due registration, was the "only evidence of the Incorporation" which the Court could receive.

If such were the correct interpretation to be placed on s. 89 C (2) it would be indispensable that prior to every prosecution for this offence the Area Commissioner or Regional Commissioner issue a certificate of approval or that such a certificate be issued to every local Chairman of a self-help project to be kept in readiness as evidence against potential dissuaders. On the other hand, were a more liberal interpretation given to the subsection, there would be the risk of admitting the evidence of persons who may be sincere but genuinely mistaken as to whether the requisite approval has been given. It may or may not be significant that in the present case, although a report was made by the third prosecution witness to the Area Commissioner, the latter issued no certificate nor appeared to testify. The fourth prosecution witness, who is the chairman of the Village Development Committee of Nyavisarara area and is also the nephew of the appellant, does not mention the scheme as approved by the Area Commissioner.

I would not perhaps go so far as State Attorney and hold that a certificate of the Regional or Area Commissioner is the only evidence which can be given of their approval of a self-help scheme. After all, if the Area Commissioner appeared in person and testified as to his approval, it would be absurd for the Court to discount such evidence. And there may well be other persons whose evidence could be acted upon and cases where it would be appropriate to do so. But such does not seem to be the present case. The learned magistrate has misdirected himself as to whose testimony purported to establish the requisite approval. Had he not so directed himself, he may well have considered the evidence of two mere laymen, the first and second prosecution witnesses, insufficient. Or he may have disbelieved them, even though the appellant did not cross-examine them on this point or give evidence controverting it. It is also to be pointed out that the section requires an "intent to impede, obstruct, prevent or defeat" a self-help scheme before a conviction can be sustained. The learned magistrate may have appreciated this requirement, but nowhere has he expressly made in his judgment any finding that the appellant had such intent.

For the above reasons, I am of the view that the prosecution failed to establish beyond reasonable doubt the essential ingredients of this offence. The appeal is accordingly allowed and the conviction is quashed. As indicated earlier, this result will give less satisfaction to the appellant than it would had the hearing of this appeal not been so long delayed.

Appeal allowed.

The appellant was not present and was unrepresented.

For the respondent:
Mrs Karim
Attorney-General, Tanzania

Nuru and another v Republic

[1969] 1 EA 85 (HCT)

Division:	High Court of Tanzania at Mwanza
Date of judgment:	15 May 1968
Case Number:	35 and 41/1968 (158/68)
Before:	Seaton J
Sourced by:	LawAfrica

[1] Criminal Law – Robbery – Distinction between offence of robbery and demanding property by menaces – Penal Code, ss. 285 *and* 292 (*T.*).

Editor's Summary

Three accused went to the house of the complainant. The first accused loaded and pointed a gun at and threatened to shoot the complainant unless he "bought his life" with Shs. 600/-. On seeing the complainant being threatened as described above, the son of the complainant on his own volition went inside the house and brought Shs. 600/-, part of a sum which had recently been received by the complainant as bride-wealth for his daughter, and offered it to the first accused who told the son to give the money to the third accused. The third accused received it and gave it to the first accused who put it in the pocket of his coat. The first and second accused were convicted of robbery (the third accused was acquitted). The two accused who were convicted appealed. On appeal the broad question for consideration was whether the facts constituted the offence of robbery under ss. 285 and 286 of the Penal Code or the offence of demanding property with menaces under s. 292 of the Penal Code.

Held –

(i) the handing over of the money by the son did not constitute a "taking" from the complainant;

(ii) a conviction of both appellants for demanding property with menaces should be substituted for one of robbery.

Cases referred to in judgment:

(1) *Gathuri Njuguna v. Republic*, [1965] E.A. 583.

(2) *John Raymond Vaz v. Republic*, [1961] E.A. 320.

(3) *R. v. Fulbhai Jethabhai Patel* (1946), 13 E.A.C.A. 179.

(4) *R. v. Edward* (1833), 1 M. & Rob. 257; C. & P. 518; 174 E.R. 88.

(5) *R. v. Donally* (1779), 2 East P.C. 713.

(6) *R. v. Cheshire* (1864), 3 N.S.W.S.C.R. 129; 15 English and Empire Digest 875.

Judgment

Seaton J: There was ample evidence that the appellants, with another man who was jointly accused with

them, went to the house of the complainant, the second prosecution witness, and there the first appellant threatened to shoot the second prosecution witness unless he “bought his life” with Shs. 600/-. On seeing the gun pointed at the second prosecution witness, his son, the fourth prosecution witness, went and fetched Shs. 600/-, which the second prosecution witness had recently received as bridewealth for his daughter, and handed the money to the third co-accused, who handed it to the first appellant who pocketed it.

On the above facts, the learned magistrate found the appellants guilty as charged of robbery with violence contrary to ss. 285 and 286 of the Penal Code, because they started their journey together and undoubtedly had a common intent. The third co-accused was acquitted because he testified that had he known beforehand of the intentions of his co-accused he would have refused to accompany them. I have consolidated these appeals which were admitted

for hearing primarily because of doubt whether the offence amounted to robbery as defined in ss. 285 and 286 of the Penal Code or demanding property with menaces contra s. 292 of the Penal Code.

The respective offences are set out in ss. 285, 286 and 292 of the Penal Code as follows:

> "285. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed 'robbery'.
>
> 286. Any person who commits the felony of robbery is liable to imprisonment for fourteen years.
>
> If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or, if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he is liable to imprisonment for life, with or without corporal punishment.
>
> 292. Any person who, with intent to steal any valuable thing, demands it from any person with menaces or force, is guilty of a felony, and is liable to imprisonment for five years."

In the instant case, the first appellant was armed with a dangerous and offensive weapon, viz., a gun, and was in the company of two other persons. He threatened to use actual violence to the second prosecution witness in taking his life. However, State Attorney contends that he should not have been convicted of robbery but of the lesser offence of demanding money with menaces. The subtle distinction between the two, she contends, is that in the case of robbery, the offender knows there is some valuable which he is going to steal and at or before the obtaining of it, he uses violence; whereas in the present case he made threats to kill which he would carry out unless paid Shs. 600/-. If the implication is that the appellants did not know that the first prosecution witness had Shs. 600/- in cash in his house, the evidence might negative such a contention in this case, because the second prosecution witness testified that many people knew that he had received Shs. 700/- as part of the bridewealth for his daughter. Of this amount he had spent Shs. 100/- on some purchases.

But does the matter turn on such a distinction? By definition in s. 258 of the Penal Code, a person steals a thing if he "takes" it, and he is not deemed to take it unless he "moves the thing or causes it to move". It is indisputable that the appellant "took" the Shs. 600/- even though it was delivered into his hands. It is well-established law that once the offender gets possession of the goods, it is theft whether the taking were by force or upon delivery. In *Gathuri Njuguna v. Republic*, [1965] E.A. 583, Rudd, J., after pointing out that the definition of robbery in the Penal Code [Kenya] differs from the definition under the law of England, observed that:

> ". . . the essence of the offence of robbery is an openly committed theft from or in the presence of someone or a theft where the offender is caught more or less in the act or immediately after the act."

The definition in the Tanganyika Penal Code similarly differs from the English definition of robbery.

The definition of demanding money with menaces has been considered in *John Raymond Vaz v. R.*, [1961] E.A. 320. Sir Ralph Windham, C.J., there laid down that: (1) the menaces or threats need not be uttered explicitly; it is sufficient if the menace, though veiled, is implicit in the circumstance in which

the money was demanded, so that an ordinary reasonable man would read the menace into the demand; (2) while the menace must be calculated to, that is to say, must be of such a nature as to be likely to, produce in the person menaced, considered as an ordinary reasonable man, some degree of fear or alarm such as would unsettle his mind, it is not necessary to show that it did in fact induce such fear or alarm in him; it is on the intention of the accused and the nature of the menace that the accused's guilt depends, rather than on the effect of the menace; (3) in the event of the menace proving unsuccessful, the test is whether, if it had been successful, and the money had been obtained, it would have been obtained in such circumstances that it could properly be said to have been stolen, with particular attention to the question whether it had been taken fraudulently and without claim of right. As to the difference between the latter offence and the more serious offence of robbery, in part it lies in the nature of the threat or menace. In the case of robbery, as well as in the case of demanding money with menaces, it may be of injury to his person or property but it can also in the latter offence be a threat to accuse him of misconduct.

Thus in the last-mentioned case, there was a conviction of demanding money with menaces where the appellant threatened to expose the dishonest business practices of his employers unless they paid him Shs. 20,000/-. And in *R. v. Fulbhai Jethabhai Patel* (1946), 13 E.A.C.A. 179, the appellant was convicted of the same offence for making demands for money if the complainant wished to escape a charge of unlawful possession of diamonds.

It may be seen, therefore, that the two offences of demanding with menaces under s. 292 of the Penal Code and robbery under ss. 285 and 286 of the Code overlap to a considerable degree. Their other main points of difference lie in the immediacy of the threat and the success of the enterprise. The use or threat of violence must be immediate in the case of robbery and it would seem that the thing demanded must be obtained from the complainant.

Applying the above definitions to the present case, it seems to me clear that the appellant was demanding money with menaces. The threat to the second prosecution witness that he would be shot unless he bought his life for Shs. 600/- could produce in any ordinary reasonable man such fear or alarm as would unsettle his mind, and it was no doubt the intention of the appellants that his threat should produce such a reaction.

The really difficult question in this appeal is whether the handing over of the money by the complainant's son, would be sufficient to constitute robbery of the complainant. In *R. v. Edward* (1833), 1 M. & Rob. 257; C. & P. 518, upon an indictment for robbing the wife of A, it appeared that the money was obtained from the wife by a threat to accuse her husband of an unnatural offence, and the money so obtained was the property of her husband. It was held that to make a case of this description a robbery, the intimidation should be on the mind of the person threatened to be accused. That decision is perhaps of some utility despite the greater breadth of the English definition of robbery, which includes other forms of putting in fear than through the use or threat of violence.

It would have been easier to decide this appeal if the money had been handed over by the complainant upon a threat by the first appellant to kill the fourth prosecution witness, his son. Such a case would have been on all fours with *R. v. Donally* (1779), 2 East P.C. 713, where a conviction for robbery was upheld. In the present case, there is no evidence that the complainant told the fourth prosecution witness to pay over the money, although the complainant subsequently seemed to accept this means of deliverance. The evidence of the fourth prosecution witness on this point is that:

> "I saw the accused putting cartridges in his gun and told my father that he would kill him if he won't give him the money and placed the barrel of the gun at the throat of the complainant. I found it better to give the accused the money than my father being killed. I went inside our house and brought Shs. 600/- with me. I wanted to give the money to accused person but he refused and directed me to third accused Nkwari. I counted the money to him and gave it to him. The third accused after receiving the money gave it to first accused, all the money, and he kept it in his pocket of his coat."

The circumstances of this case show a certain similarity to those in *R. v. Cheshire* (1864), 3 N.S.W.S.C.R. 129 (Australia); 15 English and Empire Digest, p. 875, in which some bush-rangers having captured K. and P. threatened to murder K. unless K. gave them £500. It was then arranged that the bushrangers should keep K. in custody until 10 o'clock the following morning when they said they would shoot him unless P. should go to R., the father-in-law of K., and obtain the money and return with it to the bushrangers before that time. P. went with Mrs. K. to R., who obtained the money and gave it to P., and P. then went to the place where K. was in custody. The bushrangers having asked P. whether he had the money he said "Yes", and threw it to one of the bushrangers, who put it in his pocket; the bushrangers then rode away, leaving both K. and P. at liberty: *Held*: the offence was certainly larceny, if not robbery, as against P. Semble: it was also larceny as against R.

On the somewhat narrow ground that the handing over of the money did not constitute a "taking" from the complainant, the second prosecution witness, since it was not shown to have been handed over by him or at his request, I would allow the appeals against conviction and substitute convictions under s. 292 of the Penal Code. It should perhaps be noted that the learned magistrate convicted the appellants of robbing Shs. 500/-. This was apparently through inadvertence. The evidence was such that, if the prosecution witnesses were believed, the amount obtained was Shs. 600/-.

In sentencing the appellants, the learned magistrate imposed the statutory penalty under the Minimum Sentences Act of two years' imprisonment and twenty-four strokes of corporal punishment. He also ordered Shs. 500/- compensation to be paid by the appellants. As they had a common purpose, the conviction of robbery could not be sustained in the case of the second appellant while that of the first appellant is held to be bad.

For the reasons set out above, I order the convictions to be quashed and the sentences of corporal punishment set aside. I substitute in respect of both appellants convictions of demanding Shs. 600/- with menaces and I order that they shall be jointly and severally liable to pay Shs. 600/- as compensation to the complainant. I see no reason to interfere with the sentences of two years' imprisonment imposed on each appellant.

Order accordingly.

The appellants were not represented:

For the respondent:
R Kisanga (State Attorney, Tanzania)
Attorney-General, Tanzania

National Bank of Commerce v Allidina
[1969] 1 EA 89 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	4 October 1968
Case Number:	48/1968 (161/68)
Before:	Georges CJ
Sourced by:	LawAfrica

[1] Bill of Exchange – Alterations – Whether s. 64 (2), *Bills of Exchange Ordinance exclusive.*

[2] Bill of Exchange – Promissory note – Alteration – Addition of place of payment without consent of maker – s. 64 (2), *Bills of Exchange Ordinance* (*Cap.* 215) (*T.*).

Editor's Summary

The plaintiff was the holder in due course of a promissory note made by the defendant for value received and endorsed to the plaintiff. The note was dishonoured on presentment for payment and when the plaintiff claimed the sum due in an action in the High Court, the defendant raised the defence, *inter alia*, that the note was void because of an apparent alteration on the face thereof, which had been made without the authority or consent of the defendant. The alteration was the addition of a place of payment as the National Bank of Commerce, Kilosa.

Held –

(i) Promissory notes are specifically excepted from the provisions as to acceptance by s. 90 (3) of the Bills of Exchange Ordinance;

(ii) the enumeration of particular alterations in s. 64 (2) of the Act is not exhaustive and the case must be decided on general principles as to materiality;

(iii) basically the contract entered into by the maker of the note had not been changed and the alteration was not material;

(iv) the note was not therefore avoided.

Judgment for the plaintiff with costs.

Cases referred to in judgment:

(1) *Burchfield v. Moore* (1854), 23 L.J.Q.B. 261.

(2) *Koch v. Dicks*, [1933] 1 K.B. 307.

(3) *Gardner v. Walsh* (1855), 5 El. & Bl. 83; 119 E.R. 412.

(4) *Macintosh v. Haydon* (1826), Ry. & Mood. 362; 171 E.R. 1050.

Judgment

Georges CJ: In this matter, the plaintiff, as a holder in due course, claims from the defendant the sum of Shs. 20,000/-, and interest due under a promissory note made by the defendant on June 10, 1967, for

value received and payable to Hard Fibres Ltd. This note was endorsed to the plaintiff and was dishonoured when presented for payment.

The defendant raised a number of defences, all of which he abandoned, save one – that the note was void because of a material alteration apparent on the face thereof. The plaintiff admitted that at the time of the endorsement, the place of payment was blank and that the words “The National Bank of Commerce, Kilosa” had been written in without the authority or consent of the defendant.

There can be no doubt that if the document had been a bill, it would have been avoided by virtue of s. 64 of the Bills of Exchange Ordinance, Cap. 215 (referred to hereinafter as the Ordinance). Section 64 (1) provides that a bill

or acceptance which has been materially altered without the consent of all parties liable in the bill is avoided, except as against a party who made, authorised or consented to the alteration.

Section 64 (2) provides:

> "In particular, the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's consent."

It was held before the passage of the English Bills of Exchange Act 1882 that under the common law the addition of a place of payment was a material alteration even though it did not alter a general acceptance into a qualified acceptance: *Burchfield v. Moore* (1854), 23 L.J.Q.B. 261.

All the common law cases cited by Mr. Patel are cases dealing with bills, and the argument centred on the issue as to whether the addition of a place of payment to a note without consent or authority was a material alteration which avoided the note. There would seem to be no decision on this precise point before.

I am satisfied that the case does not fall under the specific enumerations in s. 64 (2) of the Ordinance cited above. There has been no alteration of the place of payment – merely an addition. The materiality of the addition of a place of payment is restricted to addition to acceptance of a bill. Section 90 (3) (*b*) of the Ordinance specifically makes provisions as to acceptance inapplicable to promissory notes. Accordingly, a provision as to the materiality of an alteration involving the addition of a place of acceptance can have no applicability to notes.

It has not been argued that the enumeration of particular alterations which are material in s. 64 (2) of the Ordinance is exhaustive. There is authority in England, which I accept, which indicates that it is not. It was held in *Koch v. Dicks*, [1933] 1 K.B. 307 that an alteration in the place of drawing of a bill which changed it from an inland bill to a foreign bill was a material alteration. Alteration of place of drawing is not enumerated in s. 64 (2).

The question, therefore, is whether on general principle the addition of the place of payment in this case can be considered material.

Any alteration which affects the rights as between the parties to a bill is a material alteration, even though it be an alteration prejudicial to the party making it.

In *Gardner v. Walsh* (1855), 5 El. & Bl. 83, it was held that adding a party to a promissory note jointly signed by two persons was a material alteration and avoided the note. It was pointed out that the addition of a third party could possibly have been to the defendant's prejudice. For example, if the liability were joint and several and the party whose name had been added became insolvent before the note was paid, then the liability of either of the original signatories to contribute to the other who may have paid the note would be reduced from one half to one third.

Quite apart from this, however, the Court held that the defendant would be:

> "discharged from his liability if the altered instrument, supposing it to be genuine, would operate differently from the original instrument whether the operation be or be not to his prejudice."

The case was decided before the enactment of the English Bills of Exchange Act 1882, and is based on common law principles. The Court continued:

> "If a promissory note payable at three months after date were altered by the payee to six months or if being made for £100 he should alter it to £50, we conceive he could not sue the maker on it after the alteration either in its original or altered form. The alleged maker was no party to a note at three months or for £50, and the note at six months for £100 to which he was a party is vitiated by alteration.
>
> This principle, which in *Pigot's* case was established with respect to deeds, was applied to negotiable instruments in *Master v. Miller* and (as far as we are aware) has with one exception been acted upon down to the recent case of *Burchfield v. Moore*."

In *Macintosh v. Haydon* (1826), Ry. & Mood. 362, Abbot, L.C.J., held that an alteration to a bill of exchange by the addition of a place of payment was a material alteration. He held this to be so even though the nature of the acceptance had not thereby been changed from general to qualified. He stressed that once the nature of the obligation of any party to the instrument was changed, then the alteration was material.

He said:

> "Suppose indorsee knowing of the alteration passed the bill to another indorser and he to a third – the third indorser could sue his immediate indorser upon non-payment at the Bank and notice thereof – whereas acceptor had not undertaken to pay there and would have committed no default."

For that reason, he held the alteration was material. In that case an endorser had added the words "Payable at Messrs. Ransom & Co., Bankers, London" to the acceptance.

Granted that the document there being discussed was a bill and not a note, it would appear to me that the argument would be equally applicable as regards the rights of endorsees inter se had the document been a note. To make an endorser liable presentment for payment is necessary – s. 88 (2) of the Ordinance. Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an endorser liable.

Under s. 45 of the Ordinance, where there is no place of payment specified on a bill, but the address of the drawee or an acceptor is given on the bill, then the bill is presented in its proper place if presented there. This provision as to bills is applicable to promissory notes as well, and but for the addition of the place of payment the bill would have had to be presented to Box 10, Kimamba, the address of the maker appearing on the bill. On the argument set out in *Macintosh v. Haydon* (*supra*), it would appear that the addition could be said to be a material alteration.

On the other hand, it is significant that the Bills of Exchange Act 1882, which sets out to codify the common law, placed the addition of a place of payment to the general acceptance of a bill in a particular category by itself. It would have been extremely simple to have so drafted this section as to include the addition of a place of payment in the case of a note where none has been specified. The fact that there seems to be no case in which this problem has occurred before might in itself be considered an indication that the addition of a place of payment was considered material as regards bills but not as regards notes.

It would appear to me that a distinction can validly be made between Bills of Exchange and Promissory Notes in this regard. Though both are negotiable instruments, there is a much stronger case for maintaining a stricter view of the effect of an alteration of this kind where bills are considered, their use in commerce and their freedom of circulation being much wider. Basically, the nature

of the contract entered into by the maker has not been changed. Had the words not been added, presentation would not have been needed to render the maker liable.

I would hold, therefore, that the alteration is not material and that the note is not avoided.

There will be judgment for the plaintiff with costs in the sum of Shs. 20,817/-, with interest at seven per cent. until payment.

Judgment for the plaintiff.

For the plaintiff:
IG Peera
Donaldson & Wood, Dar-es-Salaam

For the defendant:
NS Patel
MS Patel & Co, Dar-es-Salaam

Onama v Uganda Argus Ltd
[1969] 1 EA 92 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	13 November 1968
Case Number:	33/1968 (165/68)
Before:	Sir Clement de Lestang Ag P, Duffus Ag V-P, Spry JA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda – Mead, J

[1] Defamation – Libel – Identity – Effect of privilege or lack of it in publication not sued on – Whether publication defamatory in itself – Publication not sued on – Whether it can be used to establish identity – Whether reasonable persons understand a reference to the appellant – Test of establishment of identity.

Editor's Summary

The respondent published on February 5, 1966 a report of a debate in the Uganda Parliament, and on February 12, 1966 published a report of a Press conference. The appellant sued for libel in respect of the second publication. The High Court of Uganda held ([1968] E.A. 511) that the publication of the first report was privileged and could not be relied upon to identify the appellant, that the evidence of the only witness called, to the effect that he identified the appellant as the person referred to, must be disregarded because of his special knowledge of the appellant, and finally, that the report of February 12 was not

defamatory of the appellant. In case he was incorrect the judge assessed the damages at Shs. 50,000/-.

Held –

(i) It did not matter whether the first report was privileged or not, since only the second report was sued on;

(ii) The second report was not of itself defamatory of the appellant nor did it impliedly repeat the allegations in the first report;

(iii) The first report could be used to establish the identity of the individuals referred to in the second report;

(iv) By the Court (Spry, J.A., dissenting) on reading the two reports reasonable persons must understand that the appellant was referred to.

(v) (By Spry, J.A., and Duffus, Ag. V.-P.). On identity, the proper test is whether reasonable people who knew the appellant thought that it referred to him. *Knupffer v. London Express Newspaper Ltd*., [1944] A.C. 116, followed.

Appeal allowed.

Cases referred to in judgment:

(1) *Bourke v. Warren & Others* (1826), 172 E.R. 138.

(2) *Jones v. E. Hulton & Co*., [1909] 2 K.B. 444.

(3) *Tolley v. J. S. Fry & Sons Ltd*., [1931] A.C. 333.

(4) *Holdsworth v. Associated Newspapers Ltd*., [1937] 3 All E.R. 872.

(5) *Knupffer v. London Express Newspaper Ltd*., [1944] A.C. 116.

(6) *Jozwiak v. Sadek*, [1954] 1 All E.R. 3.

(7) *Astaire v. Campling*, [1965] 3 All E.R. 666.

(8) *Le Fanu v. Malcomson* (1848), 1 H.L. Cas. 637; 13 L.T.O.S. 61; 9 E.R. 910.

November 13, 1968. The following considered judgments were read:

Judgment

Spry JA: On February 4, 1966, the late Mr. Ocheng, then a Member of Parliament, made certain allegations in the House of a very grave nature regarding certain persons, of whom the present appellant was one. The allegations were denied by the appellant, who challenged Mr. Ocheng, "if they were true" to repeat them in a place where parliamentary privilege would not apply. The allegations, the denial and the challenge were published the following day in a newspaper, known as the "Uganda Argus", which is published by the respondent company. I shall refer to the publication as "the first report".

On February 11, 1966, Mr. Ocheng held a Press conference, a report of which appeared the following day in the "Uganda Argus". I shall refer to this as "the second report". As a result, the appellant instituted proceedings in the High Court for libel against the respondent company, based on the second report. The suit was dismissed and it is against that decision that the present appeal is brought.

The following is an extract from the second report:

> "He said he was holding the Press conference as a reply to a challenge by the Minister of Defence that he would not repeat his allegations outside the House.
>
> > 'The reason that I have done this is because I have checked and cross-checked my information and have been convinced that the sons of Uganda who were killed in the Congo were killed not in the defence of our territorial integrity, but because certain individuals had personal interests in the conflict that was going on between the Congolese people themselves.'
>
> He said the people of Uganda would like to know who started the fight between Uganda and the Congo, when this took place, and why it took place.
>
> They would like to know how many Congolese soldiers were captured, killed and wounded, and where and when this happened. They would like to know how many Ugandan soldiers were captured, killed and wounded.
>
> They would like to be told what gold was brought into Uganda and where it was smelted in Uganda. They would like to know what steps the Government took to arrest the persons responsible for importing gold illegally into the country.
>
> They wanted to know what steps had been taken to recover the tax due on the gold, because any importation

of mineral was taxed.

‘All these questions we would like the commission mentioned in Parliament to go into,’ he said.

> He said the Prime Minister and the Minister of Defence were both members of the Defence Council, and so when the commission was appointed these two Ministers should not be concerned.
>
> 'I would personally find it extremely difficult to give evidence to a commission appointed by a body of which the Prime Minister and Minister of Defence were members,' he said."

Put very briefly, the grounds for the learned judge's decision were that the first report was privileged and could only be relied on if the allegations in it were expressly or impliedly repeated, approved or adopted in the second report; that such allegations had not been repeated but instead other allegations had been made; that the first report could not be relied on to establish the identity of the appellant as one of the persons referred to in the second report and that there was nothing in the second report itself which pointed to the appellant. The learned judge discounted the evidence of the only witness called because he thought the witness had unconsciously been influenced by his close connection with the persons concerned and by public talk.

Mr. Clerk, who appeared for the appellant and whom I would congratulate on his careful and thorough argument, attacked the judgment in several respects. In the first place, the learned judge held of the first report that "there was no evidence that the report is not fair and accurate or that in publishing the report the defendant was actuated by malice" and consequently that its publication was privileged. This finding was attacked by Mr. Clerk on the ground that the onus of proof was on the respondent company, that no evidence had been called and therefore that the learned judge was not entitled to find privilege. In its Written Statement of Defence, the respondent company had asserted that the first report "was an occasion of absolute privilege" (this was amended by leave to qualified privilege) as being "contemporaneous and fair and accurate report of the proceedings held in public in the National Assembly and was a publication without malice". The appellant did not exercise his right of reply. The basic position, as I understand it, having regard to O. 8, r. 18 (4) of the Civil Procedure Rules, was that it was then for the respondent company to prove facts establishing qualified privilege, except that it was for the appellant to prove malice, if he alleged it. In fact, the matter seems to have been taken for granted and the respondent company called no evidence. I have considered whether it could be said that the appellant was himself relying on the accuracy of the report in that his attempt, with which I shall deal later, to link up the two reports was based very largely on a statement in the first report that the appellant had issued a challenge and that according to the second report, the Press conference was held in answer to that challenge. I think, however, that the argument was equally valid whether the report of the challenge was true or not. I think, therefore, that the learned judge misdirected himself on the onus of proof and erred in holding that privilege had been established. I have thought it proper to deal with this, although I am doubtful if it affects the outcome of the appeal.

It must, of course, be kept constantly in mind that the libel alleged by the appellant is to be found, if at all, in the second report, since that was the appellant's case. The first report is only relevant if and so far as it can be used to establish the identity of the appellant as one of the individuals with personal interests referred to in the second report and if and so far as allegations in it are by reference included in the second report.

Normally, if a libel is contained partly in one publication and partly in another, the plaintiff would rely on both and the court would be entitled to look at their cumulative effect. Here, the appellant relied only on one (probably because he thought the other was privileged) and he had to show that

publication was defamatory of him. It was conceded that at least one sentence in the second report, the sentence referring to the use of troops to serve the personal interests of certain individuals, was capable of being defamatory. The only real issue was whether the appellant could properly be identified as one of the persons referred to in that sentence.

Mr. Clerk criticised the learned judge for not distinguishing sufficiently clearly between questions of law and fact, as would a judge in England sitting with a jury. I was at first inclined to think that, since in Uganda the judge has to decide both law and fact, it is not obligatory on him to take these as successive steps. On further consideration, I think there is merit in Mr. Clerk's submission, although it may not ultimately assist his case. The position was set out succinctly by Viscount Simon, L.C., in *Knupffer v. London Express Newspaper Ltd.*, [1944] A.C. 116, at p. 121, and I would respectfully adopt his words, when he said:

> "There are two questions involved in the attempt to identify the appellant as the person defamed. The first question is a question of law – can the article, having regard to its language, be regarded as capable of referring to the appellant? The second question is a question of fact – Does the article, in fact, lead reasonable people, who know the appellant, to the conclusion that it does refer to him? Unless the first question can be answered in favour of the appellant, the second question does not arise, and where the trial judge went wrong was in treating evidence to support the identification in fact as governing the matter, when the first question is necessarily, as a matter of law, to be answered in the negative."

It was submitted, but not strongly argued, by Mr. Clerk that the appellant was sufficiently identified in the second report taken by itself, since it contained an express reference to him. not by name but by the office he held, saying that he ought not to be concerned in the appointment of the proposed Commission, the implication, according to Mr. Clerk, being that he was one of the "guilty" men. This was not expressly dealt with by the learned judge, although it does appear at least to have been touched on in the lower court. In my view, there is no merit in this submission. The allegations were basically concerned with, or arose out of, conduct of the Uganda Army and the appellant was Minister of Defence. It seems to me not unreasonable for Mr. Ocheng, if he believed there had been grave misconduct, to object to the Minister of Defence being concerned in any way in the inquiry, without imputing any fault to him personally. Suppose there had been improper conduct, possibly by quite a junior officer acting without authority: it might be thought, however wrongly, that members of the Defence Council would be influenced by a kind of service loyalty and therefore that the investigation should be completely independent. In my opinion, as a matter of law, the second report in itself could not be read as defamatory of the appellant.

The main ground on which it was sought to identify the appellant as a person defamed was by reference to the first report. This raises two questions, first, whether such reference is proper and, if so, whether the effect would be to indicate to the reader that the allegations in the second report related to the appellant. The learned judge's approach to this question was inevitably affected by his finding that the first report was privileged, which led him to treat it on similar lines to publications by third parties. It was, I think, largely for this reason that he directed his mind to the case of *Astaire v. Campling*, [1965] 3 All E.R. 666. Mr. Clerk criticised both the fact that the principles of that case were applied by the learned judge and the way in which they were applied. If, as I think, the first report was not proved to be privileged, much of the basis for this argument disappears, and I do not think it necessary to deal with it.

It seems to me that the first question is whether there is anything in the second report which necessarily refers the reader back to the first report. I think there is, in the reference to the Press conference being held "as a reply to a challenge by the Minister of Defence that he (that is, Mr. Ocheng) would not repeat his allegations outside the House". There is no suggestion that there had been more than one challenge and since the second report was published just a week after the first, any reader would inevitably conclude that Mr. Ocheng had been referring to the challenge mentioned in the first report.

Even, however, if the two reports can be linked in this way, it still has to be shown that the result is to identify the appellant as a person defamed in the second report. This would have presented no problem if Mr. Ocheng had said "I have checked my information and am satisfied that what I said in the House was true". But Mr. Ocheng did not say this. Neither did he say that he was withdrawing his allegations. He made allegations which were somewhat different, although still concerned with the activities of the Uganda Army in the Congo and the arrival in Uganda of illicit gold, but he named no-one as responsible for or as having profited by those activities. Instead, he referred to "certain individuals" with "personal interests".

In this connection, Mr. Clerk made two points. One was that the reference to checking and cross-checking carried the implication that he had found his earlier allegations to be true. The second was that although Mr. Ocheng posed various questions, not one of them was as to the identity of the persons concerned. I find both arguments to have merit.

Mr. Mackie-Robertson's submissions in this respect were, briefly, that although Mr. Ocheng purported to reply to the challenge, he very pointedly refrained from confirming or reiterating his allegations; he was convinced that there had been wrong-doing, but having succeeded in his object of having a Commission of Inquiry appointed, he was prepared to leave it to the Commission to implicate the individuals responsible.

It is, of course, elementary that a publication may be libellous of a person not named in it. As Lord Campbell said in *Le Fanu v. Malcomson* (1848), 9 E.R. 910, at p. 923:

> "Whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on, know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and Christian name were ten times repeated."

I would, however, emphasise the words "know well" in that passage. As I understand the law, it is not enough to support a suit for libel that a man's friends may say "I wonder if this refers to so-and-so" or even "This might refer to so-and-so"; they must say to themselves "This does refer to so-and-so".

Obviously an ordinary reader, reading the second report, would be reminded of the first, which had appeared only a week earlier, but that in itself is not enough to make the second report libellous. As Diplock, L.J., said in *Astaire v. Campling* (above):

> "It may be that the publication of the second statement, whether it identifies the plaintiff to the reader for the first time as having been the subject of a previous defamatory statement or merely causes the reader to remember a previous defamatory statement about the plaintiff, does have the consequence that the plaintiff's reputation is lowered in the estimation of the reader; but that does not of itself give to the plaintiff a cause of action against its publisher merely because it causes damage to the plaintiff . . .

> the statement must *itself* contain, whether expressly or by implication, a statement of fact or expression of opinion which would lower the plaintiff in the estimation of a reasonable reader who had knowledge of such other facts, not contained in the statement, as the reader might reasonably be expected to possess."

The first report was mainly an attack on Colonel Amin, the Army Commander, alleging that he and "a few individuals in the Government" were planning a coup to overthrow the Constitution. There was also a specific allegation that three senior Ministers, including the appellant, had received the illicit proceeds of gold and ivory derived from the Congo and that the reason they had not taken action against Colonel Amin was fear of exposure. The second report, while posing a number of questions, contained only one positive statement, which was that Ugandan soldiers had been killed in the Congo, not for the defence of Uganda's territorial integrity "but because certain individuals had personal interests in the conflict that was going on between the Congolese people and themselves". The question is whether, on a fair reading, the second report, following on the publication of the first, was capable of being interpreted as pointing to the appellant.

I have found this a very difficult question, but after weighing all the arguments, I am not prepared to differ from the learned judge's finding that the allegation in the second report was different from those in the first report. A personal interest in the conflict that was going on between the Congolese people themselves does not seem to me necessarily connected with the receipt of ill-gotten gains from the Congo, although obviously it might be. A personal interest might just as well be political as financial. If the allegations are materially different, they cannot be coupled together for purposes of identification.

Again, it is perhaps not without significance that the appellant, according to first report, when denying the allegations, said in the House that the Ministers in question had never been involved in "the gold affairs". The first report, as I have said, related not only to the four named persons but also to other unnamed members of the Government. The second report refers to "certain individuals", without expressly connecting them with the persons named in the first report or even identifying them as members of the Government. In my opinion, there is no sufficient link between the two reports to make it possible as a matter of law to say that the second points to all or any of the persons named in the first.

If I am right in this, it is unnecessary to consider the evidence but since this was argued at length, I think I ought to deal with it.

The appellant relied on the evidence of one witness. This was a Mr. Akena-Adoko, Chief General Service Officer to the Government and secretary to the Security Committee and consequently in contact with the appellant, who was at the material time Minister of Defence. He testified that he had read both reports and that he had no doubt that Mr. Ocheng at the Press conference had been reiterating all he had said in Parliament and that the specific allegations in the second report related to the appellant.

The learned judge found Mr. Akena-Adoko an honest and sincere witness but considered that by virtue of his position, he was not representative of "the general public as exemplified by the reasonable man". He therefore disregarded his evidence.

Mr. Clerk attacked this finding, arguing that the learned judge had erred in holding that the person to whom a libel is published must not be in a special position and in holding that such a person must be ignorant of any previous publication and unaware of surrounding circumstances. The question was not

whether the witness was "representative of the reasonable man" but only whether his interpretation of the statements complained of was reasonable. It was immaterial whether he had any special knowledge. In support of this proposition, Mr. Clerk relied on *Tolley v. J. S. Fry & Sons Ltd*., [1931] A.C. 333, but, with respect, I do not think it relevant. It is true that in that case the witnesses may be said to have had special knowledge but their evidence was directed to the question whether the publication was defamatory, not to the issue of identification.

I think, with respect, that Mr. Clerk, and possibly also the learned judge, were confusing two different aspects of the case, on the one hand, the question whether the appellant was identified as one of the persons referred to in the second report and, on the other, whether the allegations were defamatory. In deciding whether words are defamatory, the test is what the words could reasonably be regarded as meaning, not only to the general public, but also to all those "who have a greater or less special knowledge about the subject matter": *Holdsworth v. Associated Newspapers Ltd*., [1937] 3 All E.R. 872, at p. 880. In deciding the question of identity, the proper test is whether reasonable people who knew the appellant would be led to the conclusion that the report referred to him: *Knupffer v. London Express Newspaper Ltd*. (above).

I think, with respect, that the learned judge was wrong to reject the evidence of Mr. Akena-Adoko on account of the position he held, although he was entitled to take it into account in weighing his evidence. At the same time, I cannot agree with Mr. Clerk that the judge was bound to accept that evidence, once he found the witness honest, there being no evidence to the contrary. This was not evidence of fact, where honest, uncontroverted evidence would normally be conclusive. The fact that a particular individual believed the report to relate to the appellant could not, in itself, be decisive. The test is whether, in the opinion of the court "a substantial number of persons who knew the plaintiff, reading the article" would believe it related to him: *Jones v. E. Hulton & Co*., [1909] 2 K.B. 444, at p. 454. Evidence by such persons is admissible: *Jozwiak v. Sadek*, [1954] 1 All E.R. 3, and the judge will give it such weight as he thinks fit, but it is for the court to decide whether the words complained of would lead reasonable people to conclude that they point to the appellant.

I would certainly agree with Mr. Clerk that such witnesses may be people with a knowledge of surrounding circumstances, but that must, I think, mean a knowledge of facts. The learned judge found that the witness, in thinking that the appellant was the subject of the allegations in the second report, had been influenced by public talk following the debate in the House, and there has been no appeal against that finding, which is clearly supported by the evidence. In my view, and I know no authority on the subject, previous public talk cannot be used to identify an unnamed person in a possibly defamatory statement, unless, of course, the statement itself refers to such talk. This factor certainly diminished the value of Mr. Adena-Adoko's evidence.

If, however, I am right in thinking that the second report is not, in law, "having regard to its language" capable of referring to the appellant, it is immaterial whether in fact the appellant's friends and acquaintances would have read it as referring to him.

For the reasons I have given, I would dismiss this appeal.

Duffus Ag V-P: The facts have been fully stated in the judgment of Spry, J.A. which I have had the advantage of reading in draft form.

The appellant's claim for libel is based on the report of a Press Conference held by Mr. Daudi Ocheng, now deceased, published on February 12, 1966 in the "Uganda Argus", a newspaper owned,

printed and published by the respondent company. The conference was held by Mr. Ocheng as a result of

allegations that he made in Parliament in support of a motion for an inquiry into certain activities over the Congo border and also to suspend a Colonel Amin. A full report of the proceedings in Parliament appeared in the "Uganda Argus" on Saturday, February 5, 1966. It appears clear that a libel was published in para. 7 of the article of February 12 and the real issue in this appeal is whether the appellant has been sufficiently identified as being one of the persons so defamed. The offending para. 7 reads as follows:

> "The reason that I have done this is because I have checked and cross-checked my information and have been convinced that the sons of Uganda who were killed in the Congo were killed not in the defence of our territorial integrity, but because certain individuals had personal interests in the conflict that was going on between the Congolese peoples themselves."

This paragraph read together with the rest of the article amounts to a definite charge against certain individuals that they have wrongly used a part of the Uganda Army and caused the sons of Uganda to be killed for their own personal interests.

The learned judge held that the publication of the report of the proceedings in Parliament of February 5 was privileged at common law. Mr. Clerk for the appellant argued that the respondent company had not discharged the onus of proving that the publication was privileged. With respect I cannot really see how this question affects the issue in this case. This action is not based on the publication of February 5, it is brought on the publication of February 12, and for the purpose of this case it does not matter whether the publication of February 5 was privileged or not. The fact that it was privileged on the occasion of its publication on February 5 would not in my view protect a subsequent repetition or adoption of the defamatory statement. The privileged publication would only be used as evidence, as part of the proof of the subsequent publication and not as a basis of the action for libel.

In this case the question is whether the publication can be used as evidence to identify "certain individuals" referred to in the article of February 12 and the simple test is whether the publication of February 5 is relevant to that issue. I do not consider that the case of *Astaire v. Campling*, [1965] 3 All E.R. 666, helps us in this issue in so far as Sellers, L.J., refers to the fact that extrinsic evidence may be given to establish identity. I entirely agree with the trial judge and Spry, J.A., that the article of February 12 did not repeat or adopt any of the defamatory statements contained in the report of February 5.

I agree with Spry, J.A., that the relevancy of the first article of February 5 is shown, apart from any other consideration, by reference to the article of February 12 itself. This is made clear by the fact that Mr. Ocheng said that he was holding the press conference as a reply to a challenge by the Minister of Defence that he would not repeat his allegations outside the House. Earlier the article had stated that the appellant, Mr. Felix Onama, was the Minister of Defence and throughout that article reference is made to what had taken place in Parliament. It is agreed by both parties that the report appearing in the "Uganda Argus" on February 5 was a report of what had taken place in Parliament. I am of the view, therefore, that the report published on February 5 was relevant evidence and should be read together with the article of February 12 to ascertain if the appellant's identity as one of the "certain individuals" having a personal interest in the conflict between the Congolese people was established.

The report of February 5 did indeed show that the most startling accusations had been made in the Uganda Parliament. The appellant is referred to by name and as being the Minister of Defence, and the charge is made that he along

with two other Ministers had shared Shs. 2½ million as a result of activities in the Congo, and it is subsequently stated that this money resulted from gold and tusks from the Congo. The report also charges a high ranking officer as being involved and also alleges a plot to overthrow the Uganda Constitution. According to the report of February 5, Mr. Ocheng's motion for an enquiry into the matter was accepted by Government and in winding up the debate, Mr. Ocheng is reported as saying that the matter raised the whole question of the Congo conflict along the border. This report was published on page one of the "Uganda Argus", a newspaper admittedly having an estimated one hundred thousand readers.

There can be no doubt that this report conveyed the most sensational news which could not but be of the greatest interest to the citizens of Uganda. There was a specific accusation that the appellant along with two other Ministers including the Prime Minister all of whom were mentioned by name had received some Shs. 2½ million resulting from gold and tusks from the Congo. A week after that report came the report of the press conference on February 12 where Mr. Ocheng clearly connected the press conference with his accusations in Parliament and stated that he was holding the conference in a reply to a challenge from the appellant to repeat the allegations outside the House. My impression from the reading of the report of the press conference is that Mr. Ocheng was trying to be very "cagey". He does not in any way recede from his original accusations, but he was trying to avoid liability for any possible libel action by not mentioning any specific names. He does, however, make the definite charge that the conflict in the Congo and the death of the Uganda soldiers was not done in the defence of the Uganda Territory but was done to further the personal interests of certain individuals. Later in the report he hints at what these interest were when he says "they would like to be told what gold was brought into Uganda".

The only witness called, Mr. Adena-Adoko, was definitely of the view that the article of February 12 referred to the Prime Minister and to the appellant, as being the certain individuals who had personal interest in the conflict.

With respect I cannot agree with Spry, J.A., that in law there was no evidence to show that the defamatory words applied to the appellant. There was, in my view, clear evidence that the libel did apply to the appellant and indeed after reading both articles, I have no doubt that this must be the meaning necessarily placed on these words by any reasonable person who had previously read the report of the proceedings in Parliament of February 5. The persons mentioned in the report of February 5 who could have been interested parties were the appellant and the two other Ministers and Colonel Amin who according to the allegations in Parliament had received vast sums of money as a result of activities in the Congo. That this is so follows especially when Mr. Ocheng has expressly stated that he is answering a challenge to repeat the allegation he made in the House outside, and when he makes no attempt to in any way retract or modify any of his accusations and when he again refers to the bringing of the gold from the Congo as being a fact. This is also borne out by the fact that the report again refers to the appellant as a Minister of Defence, and objects to the Prime Minister or himself as Members of the Defence Council, taking any part in appointment of the Commission of Enquiry, and there is also the fact that the appellant as Minister of Defence and as a Member of the Defence Council must have exercised some control over the army and the defence of Uganda.

Abbott CJ: correctly sets out the principles to be applied in his judgment in the old case of *Bourke v. Warren & Others* (1826), 172 E.R. 138, at p. 140, when he said:

> "The question for your consideration is, whether you think the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant? It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant."

I am of the view therefore that any reasonable person living in Uganda and reading both the articles of February 5 and of February 12 would have come to the conclusion that the appellant was one of the "certain individuals" who had used the Uganda Army and caused the death of some of the sons of Uganda for his personal interest as set out in para. 7 of the article of February 12 which I have already quoted.

It is conceded that these words would be defamatory of the appellant if they did in fact refer to him. These are largely questions of fact, but, the judge having accepted that the only oral evidence given was truthful, it then became a question as to whether the article of February 5 was relevant, and then as to the construction to be placed on these articles. This Court has all the evidence before it, and is therefore in as good a position as the trial judge was to decide this case.

I would therefore allow this appeal and find that the appellant has proved the libel as pleaded in para. 6 (ii), (iv), (vii) and (viii) of the plaint.

On the question of damages, Mr. Clerk submitted that if the appellant succeeds there should be a retrial for the assessment of the damage. The learned trial judge quite correctly proceeded to assess the damages. I am of the view that the judge's assessment of damages should stand. The gravamen of the libel was that the appellant had abused his position as the Minister of Defence for his own personal gain and that he was unfit to hold various offices held by him. The learned judge in his assessment appears to have also considered the allegations made in the report published on February 5 of the proceedings in Parliament to the effect that the appellant was concerned in a plot to overthrow the Government. This defamatory statement was not alleged or repeated in the article of February 12, the subject of this action, and should not have been considered in the assessment of damages. There has, however, been no cross-appeal against this assessment and in my view the other allegations concerning the use of the army and the causing of death of the sons of Uganda by the appellant for his own personal interest were such as to impute such an improper and corrupt conduct in the appellant's discharge of his Ministerial office as to warrant the damages assessed by the learned judge. I would, therefore, uphold the judge's assessment of the damages to be awarded. I would allow this appeal with costs and set aside the judgment of the lower court and in lieu thereof enter judgment for the appellant for damages at Shs. 50,000/- with the costs of the trial.

Sir Clement De Lestang Ag P: The facts giving rise to this appeal are fully stated in the judgment of Spry, J.A., and I will not repeat them. For the sake of convenience I will also use the same terminology used by him.

As I understand this appeal three questions arise for decision and I propose to deal with each of them in turn. The first is whether the second report, on which alone the claim for libel is founded, is itself defamatory of the appellant. That report contains a passage in which the late Mr. Ocheng is alleged to have said that "the sons of Uganda who were killed in the Congo were killed not in the defence of our territorial integrity but because 'certain individuals' had personal interests in the conflict that was going on between the Congolese people themselves". Then follow certain pertinent questions to which he

claims the people of Uganda would like answers such as who started the fight between Uganda and the Congo and why, the number of casualties on each side, what gold was brought into Uganda and what steps the Government had taken in connection therewith and so forth. Part of the second report is clearly libellous of these "certain individuals". It was urged in argument that the appellant was identified in the report itself as being one of these "certain individuals" by a later passage reading thus:

> "He said the Prime Minister and the Minister of Defence were both members of the Defence Council, and so when the commission was appointed these two Ministers should not be concerned.
>
> 'I would personally find it extremely difficult to give evidence to a commission appointed by a body of which the Prime Minister and Minister of Defence were members', he said.
>
> He said that it would be a very honourable act for the Prime Minister to resign and for the U.P.C. to appoint another Prime Minister to handle the whole affair."

The learned judge did not accept this contention and neither do I. The reason for mentioning the appellant, by way of his office, in the passage I have just quoted is therein explained. It is not because he has a personal interest in the conflict and the gold but because as a Member of Defence Council he would be concerned in the appointment of the proposed commission of inquiry and his taking part in this is objected to by Mr. Ocheng on the ground of propriety or bias as the case may be and no more. I may add that it was not seriously contended that the second report by itself was libellous of the appellant.

The second question is whether the allegations in the first report which it is conceded are clearly defamatory of the appellant were either expressly or by implication repeated, approved or adopted in the second report. It is, I think, common ground that these allegations were not expressly repeated, approved or adopted and I need say no more about this aspect of the case. The question is whether they were impliedly repeated etc. The appellant's argument, if I have understood it correctly, proceeds something like this. The first report contains a challenge by the appellant to Mr. Ocheng to repeat outside the House the allegations he had made in the House. The second report states unequivocally that it is a reply to that challenge and quotes Mr. Ocheng as saying:

> "He said he was holding the Press conference as a reply to a challenge by the Minister of Defence that he would not repeat his allegations outside the House."

It is contended that as the second report contains not a word of withdrawal of the allegations of the first report Mr. Ocheng in the circumstances was reiterating his previous allegations and that this is supported by his objection to the appellant taking part in the appointment of the commission of inquiry. Like the learned judge and my brothers Duffus, Ag. V.-P., and Spry, J.A., I am unable to agree.

The third and last question is whether recourse may be had to the first report to identify the appellant as being one of the "certain individuals" libelled in the second report. I agree with Duffus, Ag. V.-P., and Spry, J.A., that to decide this question it is irrelevant whether or not the first report is privileged. What is relevant is whether there is a connection between the two reports. I think there is such a connection and I have already alluded to it in dealing with the second question. In the first report which, as clearly appears from the pleadings and the conduct of the case in the court below, was a report of a debate in the House of Assembly, the appellant had challenged Mr. Ocheng

to repeat the allegations he had made in the House in a place where parliamentary privilege would not apply and this challenge appeared in the first report. There is no evidence of any other challenge and it must be assumed that this is the challenge referred to in the second report. Support is to be found for this also from the passage which I have already quoted. Since the second report not only contains no withdrawal of the accusations contained in the first report but indeed makes further allegations against "certain individuals" and refers to matters mentioned in the first report relating to gold having been brought into Uganda, there is in my view a clear link between the two reports. As in the first report it is clearly alleged that the appellant and other named persons had benefited financially from the gold and tusks brought into Uganda from the Congo it follows, in my judgment, that no reasonable person reading both reports which were given great publicity in the Press could fail to understand that the appellant was one of the persons referred to as "certain individuals" mentioned in the second report. It being conceded that the second report is libellous of "certain individuals" I would allow the appeal. As Duffus, Ag. V.-P., is of the same opinion there will be an order in the terms proposed by him.

Appeal allowed. Judgment entered for the plaintiff for Shs. 50,000/- damages and costs.

For the appellant:
AV Clerk
AV Clerk, Kampala

For the respondent:
JA Mackie-Robertson, QC and *PV Phadke*
Parekhji & Co, Kampala

Kahindi and others v Republic
[1969] 1 EA 103 (CAEA)

Division:	Court of Appeal for East Africa at Mombasa
Date of judgment:	15 November 1968
Case Number:	118/1968 (167/68)
Before:	de Lestang Ag P, Duffus Ag V-P and Spry JA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya at Mombasa – Dalton, J

[1] Criminal Practice and Procedure – Murder – Magistrate functus officio when taking statements from accused – Criminal Procedure Code (*Cap.* 75), *s.* 237 (*K.*).

[2] Criminal Practice and Procedure – Functus officio – Magistrate taking statements from accused after preliminary hearing concluded – Criminal Procedure Code (*Cap.* 75), *s.* 237 (*K.*).

Editor's Summary

The appellants were convicted of the murder of the first appellant's wife on the evidence of statements which each appellant made at the preliminary inquiry: in addition, the appellants took the police to a spot where female bones were found. The main ground of appeal was that the magistrate who purported to take the statements at the preliminary inquiry was, at the time, functus officio. The evidence showed that the magistrate made the mistake of committing the accused at the end of the prosecution case and that the preliminary inquiry was then at an end. The magistrate was functus officio at the stage when he took the statements from the appellants.

Held –

(i) the three statements taken at the preliminary inquiry must be excluded;

(ii) the remaining evidence was not sufficient to sustain a conviction for murder but fully sustained a conviction for manslaughter;

(iii) a conviction for manslaughter substituted and sentence of death reduced to imprisonment for eight years.

Appeal allowed.

Cases referred to in judgment:

(1) *R v. Campbell, Ex parte Hoy*, [1953] 1 Q.B. 585.

(2) *R. v. Gore Justices, Ex parte North* (1966), 110 Sol. Jo. 669.

Judgment

The following considered judgment of the court was read on behalf of **Sir Clement De Lestang Ag P:** The appellants were jointly tried and convicted of the murder of the first appellant's "inherited wife", an elderly woman called Jumwa daughter of Kalu. The case for the prosecution rested on three statements, to use a neutral word, which each appellant made firstly to the police when they were in police custody, secondly to a magistrate and thirdly at the preliminary inquiry resulting in their committal for trial by the High Court. It also rested on the fact that each appellant took the police to a spot where female human bones were found, and which, it was alleged, were those of the deceased. The first two statements were rejected by the learned trial judge on the ground of duress and he founded his conviction of the appellants on their statements at the preliminary inquiry coupled with the fact that they showed the human remains to the police and their own unsworn statements at the trial. These three matters, if they can properly be relied on, amply support the learned judge's decision.

It is contended however, for the appellants by Mr. Ghalia, that the statements at the preliminary inquiry were inadmissible for two reasons. The first is that, when they were made, the appellants were still under the influence of duress and the learned judge ought to have satisfied himself that they were voluntary before relying on them. The second is that they were made in contravention of the Criminal Procedure Code and that the magistrate who purported to take the statements at the preliminary inquiry, was, at the time, functus officio.

We do not see any merit in the first contention. The statements to the police and the magistrate were made over two months before those at the preliminary inquiry at which time also the appellants were no longer in police custody but on remand in prison. We think that when they made the latter statements, the duress under which they made their previous statements had clearly dissipated. We think however that there is merit in the second contention. It would appear on an examination of the record of the committal proceedings that the magistrate failed to comply with the provisions of s. 237 of the Criminal Procedure Code, the relevant portion of which reads:

> "If, after examination of the witnesses called on behalf of the prosecution, the court considers that on the evidence as it stands there are sufficient grounds for committing the accused for trial, the magistrate shall frame a charge under his hand declaring with what offence or offences the accused is charged and shall read the charge to the accused person and explain the nature thereof to him in simple language, and address to him the following words . . ."

Then follow certain words of caution.

There are two stages in a preliminary inquiry, as there are at a trial. After hearing the evidence called by the prosecution, the magistrate has to decide whether "on the evidence as it stands" there are sufficient grounds for committing the accused person. This is analogous to deciding in a trial whether there is a case to answer. If the magistrate decides that there is not sufficient evidence, he discharges the accused person; if he decides that there is sufficient evidence, he gives the accused person the opportunity to give evidence or make a statement and to call witnesses. It is only when this is done, that the magistrate makes up his mind, on the evidence as a whole, whether or not to commit. Here, the magistrate made the mistake of committing at the end of the prosecution case. While we think that the preliminary inquiry was not thereby nullified, nevertheless, it seems to us that once the magistrate had committed the appellants to the High Court, the preliminary inquiry was at an end and he was functus officio. The position is analogous to that applying in England where a magistrate on entering a conviction was held to be functus officio (*R. v. Campbell, Ex parte Hoy*, [1953] 1 Q.B. 585, and *R. v. Gore Justices, Ex parte North* (1966), 110 Sol. Jo. 669). Consequently, the statements were in our view obtained by a magistrate who was functus officio and were not admissible in evidence at the trial under s. 304 of the Criminal Procedure Code, because they were not obtained in accordance with the law and could not be regarded as voluntary as the appellants might have been misled as to their position.

Nevertheless, if all three statements are excluded, there still remain as evidence against the appellants their own unsworn statements at the trial and their pointing out of the human remains. In our view, such evidence though not sufficient to sustain a conviction for murder, fully sustains one for manslaughter and with this view, learned State Counsel agrees. We accordingly allow the appeal, set aside the conviction for murder and the sentence of death passed on the appellants, and substitute a conviction for manslaughter and sentence each appellant to eight years' imprisonment.

Order accordingly.

For the appellants:
Sadiq Ghalia
Sadiq Ghalia, Mombasa

For the respondent:
JM Long (Senior State Counsel)
Attorney-General, Kenya

Tailor v Wood and others
[1969] 1 EA 106 (HCK)

Division: High Court of Kenya at Nakuru

Date of judgment: 7 November 1968

Case Number: 46/1968 (170/68)

Before: Simpson J

Sourced by: LawAfrica

[1] Damages – Personal injuries – Fractures of legs.

[2] Insurance – Motor insurance – Third party risks – User of vehicle without compulsory insurance – Whether owner of vehicle liable.

Editor's Summary

The plaintiff sued the first defendant and his driver the second defendant for damages in respect of injuries suffered by him when knocked down in the street by a vehicle driven by the second defendant. The vehicle belonged to the third defendant who was sued because the vehicle was not covered by the statutory third party insurance. The first and second defendants denied negligence, and the third defendant denied that it had permitted the use of the vehicle without insurance.

Held –

(i) the second defendant was responsible for the accident;

(ii) the general damages of the plaintiff were assessed at Shs. 18,540/-;

(iii) the third defendant had permitted the use of the vehicle without statutory insurance;

(iv) section 4 of the Insurance (Motor Vehicles Third Party Risk) Act (Cap. 405) gave remedies to persons injured by the negligence of drivers unable to pay damages, in addition to imposing penalties;

(v) as the first and second defendants were unable to pay the judgment debt there would be judgment against the third defendant (*Monk v. Warbey*, [1935] 1 K.B. 75, followed).

Judgment for the plaintiff.

Cases referred to in judgment:

(1) *Monk v. Warbey*, [1935] 1 K.B. 75.

(2) *Mcleod v. Buchanan* [1940] 2 All E.R. 179.

Judgment

Simpson J: At about 2 p.m. on Sunday, August 6, 1967, the plaintiff, an Asian tailor, was knocked down and seriously injured by a van registered number KLC 263 in East Road, Nakuru, near its intersection with Patel Avenue.

In this suit he claims general damages and special damages amounting as amended to Shs. 4650/- from three defendants. The first defendant was Mr. Babu Wood, the employer of the driver of the van at the time of the accident; the second defendant was the driver of the vehicle; and the third defendant was the owner of the vehicle, Cooper Motor Corporation Ltd.

I shall deal first with the case against the first and second defendants. It is conceded that if the accident was due to the negligence of the second defendant the first defendant is also liable.

According to the plaintiff he walked down Patel Avenue from the direction of the Sikh Temple and turned right into East Road with the intention of crossing

over at the next road junction about seventy yards distant in order to reach his home which is situated in that road. Just after turning the corner into East Road while he was walking along the marram edge of the road the van came from behind and struck him in the back. In cross-examination he denied trying to cross the road and being knocked down in the middle of the road. He said he normally crossed at the nearest point to the road in which his house is situated.

The plaintiff was supported by a witness, George Mbarak, who said he saw the plaintiff on the side of the road. The van came up East Road at speed and round the slight bend on the wrong side of the road. It struck the plaintiff. If the van had been on its correct side the accident would not have happened.

The second defendant, the driver of the van, said he was driving slowly up the hill in third gear – by slowly he apparently meant thirty m.p.h. – when he saw the plaintiff crossing the road. He sounded his horn but the plaintiff paid no attention so he swerved to his right to pass him. The plaintiff then turned back and he was unable to avoid him.

This evidence of the second defendant is inconsistent with the position of the vehicle and the marks found on the road after the accident. The van finished on the wrong side of the road with its offside wheels on the marram edge and its nearside wheels on the tarmac. Skid marks were found extending back from the position of the van for a distance of forty-six feet and parallel to the side of the road.

The second defendant was charged with dangerous driving in respect of the accident and pleaded guilty.

I have no hesitation in preferring the evidence of the plaintiff and the witness George Mbarak. I am satisfied that the second defendant cut across the bend when driving the van at excessive speed, failed to observe or to avoid the plaintiff who was walking on the marram edge of the road and in consequence collided with him. The accident was entirely due to the negligence of the second defendant.

In his case against the third defendant the plaintiff relies on breach of statutory duty by the third defendant in permitting the vehicle to be used without third party insurance and inability of the first and second defendants to pay any damages which may be awarded. Before considering the liability of the third defendant, therefore, it is perhaps desirable to deal with the quantum of damages.

In the course of the hearing counsel for the plaintiff reduced the claim for special damages from the original figure of Shs. 5,500/- to Shs. 4,650/- and this account is not in dispute.

In addition to comparatively minor lacerations which nevertheless required stitches, the plaintiff suffered compound comminuted fractures of both bones of the left leg and a simple comminuted fracture of the shaft of the right tibia. This was broken below the knee in more than two places. Mr. Pathak, the surgeon who treated him, said unbearable pain would be caused.

The plaintiff was confined to hospital from August 6 to November 4, 1967. When discharged he had to use crutches and had to attend the hospital for some time for physiotherapy treatment. Mr. Pathak again examined the plaintiff on October 23, 1968, and found he had made a good recovery except for some slight limitation of movement in the left ankle joint. There was also a half inch shortening of the left leg. He assessed permanent disability at five per cent. and said that although the plaintiff could walk without support he was liable to suffer pain in cold weather.

The plaintiff is extremely deaf but this dates from before the accident and I do not accept his evidence that it has become worse since the accident.

The plaintiff is a tailor aged forty-four. He has not returned to work since the accident although his employers are more than willing to have him back. According to the surgeon he should be able to use a hand-operated machine or an electric machine. The only machine available however in the premises of his former employers is a pedal-operated machine which the plaintiff has tried to operate since the accident but found that owing to pain and fatigue he had to stop after five minutes. The surgeon said he should be able to operate it with slight discomfort and indeed should have been able to return to work six months after the accident. The plaintiff's salary was Shs. 465/- per month with Shs. 150/- overtime.

Having regard to the surgeon's evidence I have no doubt that had the plaintiff persevered he would have been able gradually to extend the time during which he could operate the machine until after three months he could have done a normal day's work without excessive discomfort and there is no reason to think that his employers would not have agreed to this. I assess past loss of earnings as follows:

6 months at	Shs. 615/-
1 month at	400/-
1 month at	300/-
1 month at	150/-
Total	Shs. 4,540/-

The plaintiff may still suffer considerable discomfort in using a foot-operated machine but had he returned to work six months after the accident, as according to Mr. Pathak he could have done, this would no doubt have eased considerably if not almost disappeared. In view of the surgeon's evidence I can make no award in respect of prospective loss of earnings.

Taking all the foregoing factors into account and including the foregoing figure of Shs. 4,540/- I assess total general damages at Shs. 18,540/- to which has to be added the agreed special damages of Shs. 4,650/-, making a total of Shs. 23,190/-.

Turning now to the liability of the third defendant, it is not disputed that Mr. Babu Wood, the first defendant, who is a Member of Parliament and District Secretary of K.A.N.U., arranged with Mr. James Waldron, who was then Nakuru Branch Manager of Cooper Motor Corporation Ltd., the third defendant, for the loan free of charge for the purposes of an election campaign of a vehicle for use throughout the week-end in which the accident occurred. In accordance with this arrangement the second defendant, Mr. Babu Wood's driver, collected the vehicle either on Friday evening or Saturday morning. There is some dispute as to this but the day and time of collection are immaterial. The vehicle was not covered by third party insurance. Mr. Babu Wood said insurance was never discussed. Mr. Waldron said he told Mr. Babu Wood that before the vehicle could be lent to him he would have to contact his insurance company in Nairobi to obtain appropriate cover and offered him the use of the telephone in the Sales Clerk's office for the purpose. Since an absolute liability is imposed by the statute this also in my opinion is immaterial for the purpose of determining the liability of the third defendant. However in case a further finding of fact might be required by a higher court I would add that I cannot feel satisfied that there was any agreement that Mr. Babu Wood would contact his insurers to arrange third party insurance. I am inclined to the view that had Mr. Babu Wood been reminded of the need for third party insurance he would merely have asked Mr. Waldron to arrange it which Mr. Waldron, having been placed in an embarrassing situation, would reluctantly have done, through one of the insurance companies for which the corporation is an agent.

Be that as it may there is no doubt that the third defendant through its servants permitted the use on

the road by the first and second defendants of this van

KLC 263 which was not covered by third party insurance. There is no suggestion that the acts of these servants were outside the scope of their authority. The third defendant was accordingly in breach of its statutory duty under s. 4 of the Insurance (Motor Vehicles Third Party Risks) Act (Cap. 405).

The fact that the third defendant when charged in the Resident Magistrate's Court at Nakuru with an offence under s. 4 (1) of Cap. 405 was on the evidence there adduced acquitted is not relevant in these proceedings.

In the pleadings the third defendant denied ownership of the van involved in the accident on the ground that it was merely lying in its garage at Nakuru for resale. In evidence however Mr. Waldron admitted that although the vehicle was for this reason not registered in the name of the third defendant it had in fact been purchased by the third defendant. The third defendant was clearly the owner of the vehicle.

The plaintiff contends that neither the first nor the second defendant has the means to pay any damages which may be awarded and accordingly, on the authority of *Monk v. Warbey* [1935] 1 K.B. 75, the third defendant is liable. In *Monk v. Warbey* the Court of Appeal in England held that where a person is permitted by the owner to use a vehicle uninsured against third party risks and injury is caused by his negligent driving to a third party, that third party may, where the uninsured person is without financial means, sue the owner of the vehicle direct for damages for breach of statutory duty. Section 35 (1) of the English Road Traffic Act imposed a duty on persons not to cause or permit any other person to use a motor vehicle unless the user thereof was insured against third party risks, and an owner's breach of statutory duty was not only punishable as a criminal offence, but the owner might also be civilly liable in damages for personal injuries sustained by a third party as a result of an uninsured driver's negligence.

This decision of the Court of Appeal has been generally followed in England and Scotland and has been approved by the House of Lords (*McLeod v. Buchanan*, [1940] 2 All E.R. 179). No East African case in which *Monk v. Warbey* has been followed has been brought to my attention but counsel for the third defendant conceded that it should be followed by this Court.

Section 4 (1) of the Kenya Act reads as follows:

> "Subject to the provisions of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act."

It is identical with s. 35 (1) of the English Act and the object of the two Acts is the same, that is the protection of persons injured by the negligence of drivers who are unable to pay damages for these injuries. It was held that, on the true construction of the English Act, the section was passed to give a remedy to such persons as well as to punish offenders under the section. I have no difficulty in coming to the conclusion that s. 4 of the Kenya Act was passed for the same purpose.

It was contended on behalf of the third defendant that it is not liable to pay any damages awarded in this case because the first defendant is a man of substance. It was I think conceded that the second defendant is without means.

The first defendant has a farm of 32.5 acres with a stone-built house thereon which is mortgaged to the Land Bank. On the farm he keeps pigs which bring in a small income required according to the first defendant for payment of

interest to the Land Bank. Part of the farm is planted with geraniums from which he hopes shortly to obtain further income.

As a Member of Parliament he draws a net salary of approximately Shs. 1,450/- per month. In addition as Principal of Kenyatta Institute he receives approximately Shs. 1,500/- per month after deduction of tax.

On the other hand there are several unsatisfied judgments standing against him both in the High Court and in the Resident Magistrate's Court at Nakuru. The first defendant's own estimate of his debts is £3,000, an estimate which has not been seriously disputed.

In the course of his judgment in *Monk v. Warbey*, Greer, L.J., said:

> "All that is required is that it should be proved that the man who was primarily liable is in such a financial position that nothing can be obtained from him by execution or by bankruptcy proceedings . . ."

This has I think been proved in the present case with respect to the third defendant.

It is clear that although in time the first defendant may be in a position to pay the damages awarded in this case there is little likelihood of his being able to start doing so for three or four years at least. The plaintiff cannot be expected to wait.

There will be judgment for the plaintiff against the three defendants jointly and severally for Shs. 23,190/- with interest at Court rates from the date of filing this suit to the date hereof on Shs. 9,190/- and from the date of this judgment to the date of payment in full on the whole amount of Shs. 23,190/- together with costs and interest thereon and with a certificate for two counsel.

Judgment accordingly.

For the plaintiff:
SC Gautama and *KM Patel*
KM Patel, Nakuru

For the first and second defendants:
HS Daine
Daine & Wariithi, Nairobi

For the third defendant:
KJ Patel
KT Patel, Nakuru

Abdulla v Esmail
[1969] 1 EA 111 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	22 November 1968
Case Number:	36/1968 (185/68)

Before:	Sir Clement de Lestang Ag P, Duffus Ag V-P, Spry JA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya at Mombasa – Mosdell, J

[1] Civil Practice and Procedure – Pleading – Cause of action – Statement of.

[2] Civil Practice and Procedure – Pleading – Particulars – Whether particulars should be ordered where respondent denies having any – Whether particulars should be ordered before defence – Plaint inadequate – Form of order – Civil Procedure (*Revised*) *Rules* 1948, *O.* 6, *r.* 3 *and O.* 7, *r.* 1 (*K.*).

Editor's Summary

The respondent sued the appellant claiming money lent (*inter alia*) up to August, 1960. This was different from details given in a letter from the respondent's advocates. The appellant applied for particulars of the dates and manner of payment of the money alleged to have been lent. The respondent swore that he had no particulars of the amounts lent and repaid before August, 1960. The judge refused particulars and the appellant appealed.

Held -

(i) the plaint did not comply with Ord. 7, r. 1 of the Civil Procedure (Revised) Rules, 1948, in that it did not state when the cause of action arose;

(ii) particulars given in the plaint were clearly inadequate;

(iii) the respondent could say approximately when the transactions started and the approximate dates and amounts of individual loans and he would accordingly be ordered to supply such particulars.

Appeal allowed.

Cases referred to in judgment:

(1) *Phillips v. Phillips and Others* (1878), 4 Q.B.D. 127.

(2) *Ross v. Blakes Motors Ltd*., [1951] 2 All E.R. 689.

November 22, 1968. The following considered judgments were read.

Judgment

Duffus Ag V-P: This is an appeal against an interlocutory order of the High Court refusing an application by the defendant/appellant for further particulars of the plaint. This appeal is brought with leave.

The relevant portion of the plaint reads:

> "3. Plaintiff's claim against the Defendant is for Shs. 32,550/- being the amount due and owing by the Defendant to the . . . Plaintiff for balance of cash lent and advanced by the Plaintiff to the Defendant as per following particulars –

Amount of money lent and advanced by the Plaintiff to the Defendant up to August, 1960		Shs. 53,000.00
Less paid by the Defendant to the Plaintiff on or about 25th April 1962	Shs. 12,000.00	
Less paid by the Defendant to the Plaintiff during 1964, 1965, 1966 and 1967 as per particulars already supplied to the Defendant on or about 14th April, 1967 ..	Shs. 8,450.00	
	Shs. 20,450.00	Shs. 20,450.00
Balance		Shs. 32,550.00

4. Demand for the said amount has been made but the Defendant has failed or neglected to pay the said amount or any part thereof.

5. The Defendant resides at Mombasa, the amount was lent and advanced at Mombasa and the same is repayable at Mombasa within the jurisdiction of this Honourable Court."

The appellant entered an appearance by his advocate and then applied for further particulars by letter and on the plaintiff/respondent failing to give such particulars he applied to the Court by virtue of Ord. 6, r. 3, of the Civil Procedure (Revised) Rules, 1948.

In summarising the facts I would first refer to the correspondence between the parties prior to the issuing of the plaint, which was put in evidence by consent on the hearing of the application.

This started with a letter from the respondent's advocate to the appellant dated April 12, 1967, demanding the payment of Shs. 46,550/- being balance of the amount lent and advanced by the respondent to the appellant. The appellant by his advocate replied on April 13, 1967, denying owing the respondent any money, but asking without prejudice for particulars of the alleged loan. The respondent's advocates replied on April 14, 1967. They stated, *inter alia*, that Shs. 35,000/- was due for cash lent and advanced before 1958, but further details of this amount were not available and that Shs. 20,000/- was in respect of a charge created by the appellant on property of a Mr. H. C. Stephen in August, 1956, which sum was realised and kept by the appellant. The letter then set out in detail payments made on account by the appellant in 1964, 1965, 1966 and 1967 of some Shs. 8,450/-. The balance according to these details then appeared to be Shs. 46,550/-. It must be noted that the plaint claims Shs. 53,000/- as being money lent and advanced by the appellant up to August, 1960. The main differences between the plaint and the particulars given in the letter of April 14 were:

(*a*) a decrease of Shs. 2,000/- in the amount claimed,

(*b*) the amount now set out in the plaint is for money lent and advanced "before January, 1960", but in the letter of April 14 it was said as to Shs. 35,000/- to be for moneys lent and advanced "before 1958" and as to Shs. 20,000/- to be moneys had and received for the respondent in August, 1956, by the realisation on property of H.C. Stephen,

(*c*) there is an additional payment of Shs. 12,000/- on or about April 25, 1962.

After the suit was filed appellant's advocate wrote asking for particulars as to when and how this money was lent. The respondent's advocate replied by his letter of September 16, 1967, stating that the Shs. 53,000/- was the balance of the amount due for cash lent and advanced from time to time and up to August, 1960, and that his client "has no particulars of the dates or the various amounts lent from time to time or dates and amounts of any repayment prior to August, 1960".

The appellant then applied by the motion asking for particulars now the subject of this appeal. He asked for an order that:

"1. The Plaintiff do give to the Defendant further and better particulars to show when the amount of Shs. 53,000/- was lent and advanced by the Plaintiff to the Defendant.

2. The Defendant may file his defence herein within such time as may be ordered.

3. The costs of this application be provided for."

The appellant filed an affidavit in support of his application and the respondent filed an affidavit in reply. In para. 4 of his affidavit the respondent averred:

> "4. Prior to the filing of the application herein by the Defendant it was made absolutely clear that I cannot give any further particulars or information as I am not in possession of further or better particulars or information other than what I have already supplied."

The respondent then annexed to his affidavit the copy of the letter of April 14, 1967, to which I have already referred and stated that this letter gave all the particulars which he had. I have already set out the differences between the contents of that letter and of the plaint.

The application for further particulars is made under Ord. 6, r. 3, which provides that further and better particulars of the nature of the claim or defence, or of any matter stated in any pleading may in all cases be ordered upon such terms as to costs and otherwise as may be just. Rule 1 provides that every pleading shall contain a statement in a concise form of the material facts upon which the party pleading relies for his claim but not the evidence by which they are to be proved.

I would also here refer to the requirements of a plaint. Order 7, r. 1 provides, *inter alia*:

> "1.(1) The plaint shall contain the following particulars:
>
> (*e*) The facts constituting the cause of action and when it arose."

The appellant contended both in the court below and here that the plaint did not comply with this rule, as it did not state when the cause of action arose, as it only stated "an amount of money lent and advanced by the Plaintiff to the Defendant up to August, 1960".

The respondent's advocate, Mr. Ram Hira, conceded that it was necessary to give the date of the cause of action but he submitted that this was sufficiently given by stating that it happened before a certain date and that in any event the respondent's statement on an oath that he could not give further particulars should be accepted. Mr. Ram Hira also stressed the point that this was essentially a matter in the discretion of the judge and that his ruling should not be disturbed by this Court.

The learned judge refused to order particulars and in his ruling after referring to the judgment in *Phillips v. Phillips* (1878), 4 Q.B.D. 127, said:

> "All this is eminently reasonable but in this instant suit the plaintiff has averred on oath that he is unable to supply any further particulars. It seems to me that the defendant is in as good a position to know the facts as the plaintiff. The Plaintiff appears to have been lending money to the defendant at any rate for the past twelve years and defendant appears to have made re-payments on account from time to time to the plaintiff over the same period."

and then finally the learned judge said:

> "In this case I think the best course is to refuse to order particulars until after discovery as was done in *Ross v. Blakes Motors Ltd*., [1951] 2 All E.R. 689. I, therefore, make the following order:
>
> 1. The defendant shall file his defence within fourteen days from to-day.
>
> 2. Each party shall make discovery to the other under Ord. X, r. 11 within fourteen days from the filing of such defence.

3. Plaintiff being at liberty to supplement the particulars he has already given within fourteen days after discovery and inspection has taken place.

4. Costs of this application shall be costs in the cause."

Mr. Anjarwalla, who appeared for the appellant, submitted that the application for particulars was reasonable and that the appellant would be placed at a considerable disadvantage if he had to file his defence without knowing when the cause of action arose. In this respect I refer to r. 5 of Ord. 6 which requires the defendant to raise by his pleading all matters which show that the action is not maintainable and

> ". . . all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as for instance, fraud, limitation, release, payment, performance, or facts showing illegality either by statute or common law."

It is quite clear that the particulars given in the plaint are inadequate. The plaint only refers to an amount of money lent and advanced up to August, 1960, and the question arises whether this was an amount lent in one sum or in a series of loans and if so what amounts and when. The cause of action is stated as arising up to August, 1960. This is a most indefinite and inconclusive statement. According to this the date of the cause of action whilst limited on one side to not "beyond August, 1960", goes back on the other to infinity. There can be no doubt that this is undoubtedly a case where further and better particulars would be required and the only question here is whether the judge was correct in acting as he did on the respondent's assertion on oath that he could not give further particulars.

The judge relied on the statement contained in the respondent's affidavit and then went on to say that "it seems to me that the defendant is in as good a position to know the facts as the plaintiff". With respect this statement does appear to justify Mr. Anjarwalla's submission that the learned judge appears to have accepted the respondent's case in advance, as nowhere does the appellant on the record admit having borrowed any money from the respondent, and I cannot from the records find any facts to justify the conclusion that the appellant would be in as good a position as the respondent to know the facts. It does appear from the respondent's affidavit that he can in fact supply some further and better particulars. In his affidavit the respondent refers to the letter of April 14 and states that this letter gives all the particulars that he had, but reference to this letter shows that:

(*a*) the amount lent was on dates before 1958, and

(*b*) that a specific sum of Shs. 20,000/- was had and received by the appellant in August, 1956, on the "Stephen charge",

but in his plaint the respondent only claims one amount of Shs. 53,000/- for moneys lent and advanced up to August, 1960. Clearly, apart from any other consideration, the appellant, due to the material differences between the plaint and the particulars supplied in the letter of April 14, is placed in a position of considerable uncertainty. The respondent states that all the particulars are contained in that letter but if this is so, then is he continuing with the claim of Shs. 20,000/- in respect of the "Stephen charge"? Is he claiming for money lent in one sum or in a series of sums prior to August, 1960, or is this date correctly stated as being prior to the year 1958? On this point the appellant is in my view entitled to have the matter clarified by further and better particulars of the plaint.

The respondent in his affidavit states that he was prepared to file an affidavit of documents and allow inspection after the defendant had filed his defence.

The judge in his ruling ordered that the party should make discovery under Ord. 10, r. 11, within fourteen days from the filing of the defence. The appellant complains that the order of discovery was improper as neither party had applied for this order. This would appear to be correct. The respondent had volunteered to give discovery of documents but neither party had applied to the court for discovery.

An order of this sort is a matter for the discretion of the judge and this Court will not interfere unless satisfied that some wrong principle has been applied or that some manifest injustice may result to either party. The respondent has not complied with the requirements of Ord. 7, r. 1 as he has not stated when the cause of action arose. As I pointed out it has been made apparent by the respondent's own affidavit that he can supply some further particulars. It appears that at least a portion of the lump sum that he claims refers to the Shs. 20,000/- in the Stephen transaction received by the appellant in August, 1956 and that the balance was for one or more transactions either before 1958 or before 1960. The respondent must be in a position to say at least approximately when this transaction or series of transactions started and to fix the time within some definite period and not to leave it as at present completely indefinite and he should also be able to say the approximate date and amounts of each individual loan if there were in fact a series of transactions. I consider that to require the defendant to file his defence without knowing further particulars and without knowing approximately when the cause of action arose would be most embarrassing and unfair.

The learned judge followed the precedent of an order made in *Ross v. Blakes Motors, Ltd.*, [1951] 2 All E.R. 689. The facts in that case were entirely different; there the required particulars were on facts clearly within the peculiar knowledge of the defendants. In England by Ord. 18, r. 12 (5) of the Rules of the Supreme Court particulars of a claim must not be ordered before service of the defence unless, in the opinion of the Court, the order is necessary or desirable to enable the defendant to plead or for other special reasons. This would be the position in this case where it would be most unfair to ask the defendant to plead his defence in a claim for moneys lent and advanced without knowing when the cause of action arose and without really knowing the claim or claims that he has to meet. After full consideration I am of the view that this is a case in which the learned judge has wrongly exercised his discretion and this appeal should be allowed. The respondent can at any rate give in full such particulars as he has to show when the cause or causes of action arose.

I would therefore allow this appeal and substitute for the order of the High Court an order that the plaintiff/respondent be ordered to give the further particulars sought by this application, that is to say when the amount of Shs. 53,000/- was lent and advanced, within fourteen days and that the defendant/ appellant should file his defence within fourteen days thereafter, and I would order that the costs of the application in the High Court be costs in the cause. I would allow the appellant the costs of this appeal.

Spry JA: I have had the advantage of reading the judgment of Duffus, Ag. V.-P., with which I am in complete agreement. I think a defendant must be entitled to further and better particulars, when the information he is seeking may materially affect the framing of his defence or the decision whether to make any payment into court. I appreciate the difficulty experienced by the learned judge when faced with an affidavit by the plaintiff that he was "not in possession of further or better particulars or information other than what I have already supplied". I appreciate also that the plaintiff may not be able to furnish the exact date or dates on which a loan or loans is or are alleged to have been made. I find it hard to believe, however, that he cannot say whether the money

he alleges he lent was advanced on one occasion or several and cannot indicate at least approximately the period within which the loan or loans was or were made. Moreover, the plaint expressly refers to the letter of April 14, 1967, written by the plaintiff's advocates and yet, as Duffus, Ag. V.-P., has pointed out, the claim in the plaint is materially different from that in the letter. In this respect, I think the plaintiff is clearly under a duty to particularize his claim. In my view, this is a case where an order should have been made for the plaintiff to furnish the best particulars he can. In the event, they may not be very satisfactory but they may help the defendant to prepare his case, and may, in some measure, tie down the plaintiff, whose case at present seems to me ambiguous. Reluctant as this Court is to interfere with a judicial discretion, I think this appeal should be allowed and I agree with the order proposed.

Sir Clement De Lestang Ag P: I also agree. The order will be as proposed by Duffus, Ag. V.-P.

Appeal allowed.

For the appellant:
HAT Anjarwalla
HAT Anjarwalla, Mombasa

For the respondent:
Ram Hira and *CK Kanji*
AB Patel & Patel, Mombasa

The Oriental Fire and General Assurance Ltd v Govinder and others
[1969] 1 EA 116 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	29 November 1968
Case Number:	39/1968 (186/68)
Before:	Sir Clement de Lestang Ag P, Duffus Ag V-P, Spry JA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya at Mombasa – Mosdell, J

[1] Evidence – Of fact clearly implied in pleading.

[2] Evidence – Res gestae – Whether statement after motor accident part of res gestae.

[3] Evidence – Statement – Joint interest of parties not in existence at time of statement.

[4] Insurance – Motor Insurance – Statutory third party liability – Materiality of misrepresentation – Insurance (*Motor Vehicles Third Party Risks*) *Act* (*Cap.* 405), *s.* 10.

Editor's Summary

The appellants sued the respondents for a declaration under s. 10 (4) of the Insurance (Motor Vehicles Third Party Risks) Act (Cap. 405) claiming to be entitled to avoid a motor vehicle policy given to the respondent covering statutory third party liability on the ground that the first respondent had made a representation of fact false in a material particular in that he denied having been involved in an accident in a motor vehicle owned and driven by him. The second and third respondents had been injured in an accident involving the insured vehicle. The Judge held that it was proved that the first respondent had been involved in an accident in a vehicle owned and driven by him, but held that the misrepresentation was not material. The appellant appealed, challenging the finding on materiality. The respondents cross-appealed, alleging that the Judge should not have received evidence of ownership of the vehicle when the fact

was not alleged in the pleadings. The second and third appellants also cross-appealed, alleging that the Judge had wrongly admitted as against them the evidence of a statement made by the first respondent to a police officer that he was driving the car involved in the first accident.

Held –

(i) the materiality of the misrepresentation is a question of fact and as there was evidence on which the Judge could find that the misrepresentation was not material, his finding would not be interfered with;

(ii) the judge properly admitted evidence that the first respondent owned the motor car since his ownership of it was clearly implied in the plaint (*Sullivan v. Alimohamed Osman*, [1959] E.A. 239, followed);

(iii) as the respondents had no joint interest to maintain at the time it was made, the first respondent's statement to a police officer that he was driving the car was wrongly admitted against the other respondents (*Merchants & Manufacturers Insurance Co. Ltd. v. Hunt*, [1941] 1 All E.R. 123 followed);

(iv) the statement of the first respondent was not part of the res gestae in that it was not spontaneous or said at or immediately after the time of the accident (*Tustin v. Arnold & Sons* (1915), 84 L.J.K.B. 2214 followed).

Appeal dismissed.

Cases referred to in judgment:

(1) *Catt v. Howard (*1820), 3 start 3; 71 E.R. 747.

(2) *Tustin v. Arnold & Sons* (1915), 84 L.J.K.B. 2214.

(3) *Yorke v. Yorkshire Insurance Co. Ltd.*, [1918] 1 K.B. 662.

(4) *Mutual Life Insurance Co. of New York v. Ontario Metal Products Co. Ltd.*, [1925] A.C. 344.

(5) *Merchants & Manufacturers Insurance Co. Ltd v. Hunt*, [1941] 1 All E.R. 123.

(6) *Davies v. Fortior Ltd.*, [1952] 1 All E.R. 1359.

(7) *Sullivan v. Alimohamed Osman*, [1959] E.A. 239.

November 29, 1968. The following considered judgments were read:

Judgment

Spry JA: This appeal arises out of an application to the High Court by the appellant company for a declaration under s. 10 (4) of the Insurance (Motor Vehicles Third Party Risks) Act (Cap. 405). The facts, briefly, are as follows. On October 7, 1965, the first respondent completed a proposal form seeking statutory third party cover for a motor vehicle and a policy was duly issued on October 15. On July 29, 1966, while the policy was still in effect, the insured vehicle driven by the first respondent was involved in an accident in which the second and third respondents were injured. On February 23, 1967, the appellant company, believing that the second and third respondents were about to institute proceedings

against the first respondent claiming damages which, if awarded, the appellant company would be liable to pay, filed a plaint claiming to be entitled to avoid the policy. On the same day, the appellant company gave notice of the action to the second and third respondents and their advocates.

The ground on which the appellant company relied in seeking a declaration was that in completing the proposal form the first respondent had made representations of fact false in a material particular. In this appeal, we are concerned with only one item in the proposal form, which reads as follows:

> "18. Give records of Accidents and/or Losses during the past three years in connection with any motor vehicle owned and driven by you whether insured or uninsured including any claims outstanding."

The item then provided spaces for various details. The first respondent answered this item with the word "Nil". The appellant company claimed that the first respondent had in fact been involved in an accident on or about November 1, 1964.

In his judgment, so far as it is necessary to consider it for the purposes of this appeal, the trial judge found as a fact that the first respondent had been involved in an accident to a motor vehicle on November 1, 1964. He then considered whether it had been proved that the first respondent had been both the owner and the driver of the vehicle. The question of ownership did not present any serious difficulty if the evidence relating to it was properly admitted, but the only evidence that the first respondent had been driving the vehicle was an admission he made to a police officer after the accident of November 1, 1964, and an admission contained in his answers to certain interrogatories put to him in the suit brought by the appellant company. It had been submitted that this evidence, while admissible against the first respondent, was inadmissible against the second and third respondents and therefore that as against them, the falsity of the reply to item 18 had not been proved. The learned judge held that the admissions were admissible against all the respondents and that the falsity of the reply had been proved. Finally, the learned judge considered whether the reply was false in a material particular and held that this had not been proved. He accordingly dismissed the suit as against all three respondents.

Against that decision, the appellant company has appealed, submitting that the learned judge was wrong in holding that the misrepresentation was not material. All three respondents have cross-appealed, but I think it will be convenient to deal with the appeal before turning to the cross-appeals.

We have the advantage that there is a statutory definition of the word "material". Section 10 (6) of the Act provides:

> "(6) In this section, 'material' means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions."

Evidence was given on behalf of the appellant company by a Mr. Kataria, a young man employed as an underwriting clerk by a company which holds the chief agency for the appellant company. He said that had he known that the first respondent had been involved in any accident, he would have refused the proposal. He said that where an accident was disclosed, his company would only issue a policy if the accident had been a minor one and the proposer was a "good client". On the other hand, evidence was given by a Mr. Mulcock, an insurance broker called by the first respondent. He had considerable experience of insurance work and he expressed the opinion that where a proposer had been driving for thirteen years, the fact that he had had in the previous three years only one accident in which no personal injuries were caused would not result in his proposal being refused, at least so far as statutory third party liability was concerned. He also said that where a proposal was for statutory third party cover, there was no question of an enhanced premium: such a proposal would either be accepted or refused. The learned judge, after summarizing this evidence, said that he preferred the evidence of Mr. Mulcock because of his greater experience. He concluded by saying that it followed that he held the misrepresentation not to have been proved material.

Mr. Nazareth, Q.C., who appeared for the appellant company attacked this decision in several respects, of which the principal was that the learned judge

had based his decision on the opinion evidence of one witness as against that of another. Mr. Nazareth submitted that the test is an objective one: the Act has introduced the concept of the "prudent insurer", which is analagous to the familiar example of the reasonable man. He argued, relying on *Yorke v. Yorkshire Insurance Co. Ltd*., [1918] 1 K.B. 662, that materiality is a matter of mixed fact and opinion and must be decided on a basis of "every-day good sense". He submitted that of all the information the appellant company required, the record of previous accidents was the most important. The risk obviously depended on whether or not the proposer was "accident-prone". He submitted also that the difference between having had no accident and having had one accident is particularly important, different in kind as well as degree from that between records of, say, four and five accidents. So far as the facts of the case were concerned, a police officer who gave evidence regarding the accident on November 1, 1964, had spoken of "big damage" and there was evidence that the car had been written off.

Mr. Inamdar, who addressed the main argument on behalf of all three respondents, argued that the question is entirely one of degree, depending on the particular circumstances of each case. He submitted that the correct test is to be found in the judgment of the Judicial Committee in *Mutual Life Insurance Co. of New York v. Ontario Metal Products Co. Ltd.*, [1925] A.C. 344, in which, after observing that materiality must always be a question of degree, it was said, at p. 351:

> "it is a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium."

Mr. Inamdar submitted that there is no authority for saying that non-disclosure of a single accident, however small and however slight the loss, is necessarily material and he drew attention to the fact that the police officer had testified that he recorded the accident of November 1, 1964, as "non-reportable" because no-one was injured. The fact that the car was written off was not in itself indicative of the gravity of the accident. because the car had been an old one, for which spare parts were not available, and of comparatively low value.

I have no doubt that materiality is a matter of degree. In this connection, I think, with respect, that much of the examination of the witnesses was misconceived and that this misled the learned judge into a wrong approach to the problem. The Court was not, or at least not directly, concerned with the question whether the appellant company would have refused the proposal had it been aware of the accident of November 1, 1964, neither was it concerned with the question whether the appellant company, or any other insurer, would regard the question as to accidents as material or with the question whether one accident as opposed to none is a material fact. The question in issue was whether a prudent insurer would have been influenced in deciding whether or not to grant statutory third party cover by knowledge of the particular accident which occurred on November 1, 1964. It is the misrepresentation in the answer, not the question or the answer itself, that is or is not material.

The only material available to the court was some very scanty evidence regarding the accident and the opinions of Messrs. Kataria and Mulcock. All that the record discloses of the accident itself is that no other vehicle was involved, that no-one was injured but that the vehicle in question, which was an old model for which spare parts were not available, was so damaged as a result of leaving the road that its owner decided to write it off. Mr. Kataria's evidence really amounts to nothing more than that he, as an employee of the main agent of the appellant company, would have refused the first respondent's proposal had he

been aware of the previous accident. With his limited experience, he probably could not have said more than that. Mr. Mulcock, with much greater experience, said that he thought insurers in general would not be influenced by knowledge of one accident, where statutory third party cover only was sought, where the accident had not involved personal injury and where the proposer had thirteen years driving experience. It is unfortunate that most of the questions put to Mr. Mulcock were irrelevant, that he was not questioned specifically in relation to the facts of the particular case and that his evidence was not more factual as to the practice of insurance companies.

In my view, the learned judge, who appears to have accepted both Mr. Kataria and Mr. Mulcock as honest witnesses even though he suggests that the former was not disinterested, preferred the evidence of Mr. Mulcock on the ground of his greater experience. I think he was justified in this, particularly since Mr. Mulcock had experience of more than one insurance company.

The judge was not, of course, bound to base his decision on the evidence of Mr. Mulcock, which was opinion evidence only, but I think he was entitled to do so, when the evidence regarding the accident in question was so inadequate. It might well have been otherwise had there been evidence showing recklessness or gross negligence on the part of the first respondent, but there was none, and the loss caused by the accident was not very substantial. I can see no ground, therefore, for interfering with the decision of the learned judge and I would dismiss this appeal.

I turn now to the cross-appeals. The first respondent cross-appealed on one ground only, that the learned judge had admitted evidence that the car involved in the accident of November 1, 1964, was the property of the first respondent, when that fact had not been alleged in the plaint or made an issue at the trial. That was also one of the grounds advanced in the cross-appeals of the second and third respondents.

I see no merit in this submission. In arguing it, Mr. Inamdar relied on the case of *Sullivan v. Alimohamed Osman*, [1959] E.A. 239, in which Windham, J.A. (as he then was) said that failure to make an allegation of fact which, in the light of the other facts alleged, was necessary to success makes a claim bad. With that I would respectfully agree, but earlier in his judgment, with which the other members of the Court agreed, Windham, J.A., had said, in relation to another fact not pleaded:

> "This omission would of course be fatal to the claim if the correct approach to the plaint were the literal one. But it is not. That which is necessarily implied from its context must be read into the plaint."

In the present case, the plaint had alleged that the first respondent had answered a request for particulars of accidents in connection with motor vehicles owned and driven by him, with the word "Nil". It went on to allege that that answer had been materially false in that the first respondent had been involved in an accident on November 1, 1964, while driving a motor vehicle. If that vehicle had not been owned by the first respondent, his answer would clearly not have been false. I think therefore that the first respondent's ownership of the vehicle was clearly implied in the plaint. I may add that I am at a loss to understand why, when objection was first taken to the admission of evidence of ownership, learned counsel for the appellant company did not ask leave to amend, if only ex abundanti cautela. I would therefore dismiss the first respondent's cross-appeal and reject the first ground of the cross-appeals of the second and third respondents.

The second ground in the cross-appeals of the second and third respondents was that the judge had erred in admitting, as against those respondents, evidence

of a police officer as to an admission made to him by the first respondent following the accident of November 1, 1964. The judge held that the evidence was admissible as against all three respondents because they had a joint interest in maintaining the validity of the policy. He went on to say that if he were wrong in that, he would still hold the evidence admissible because the witness had been cross-examined by counsel for the second respondent and had been available for cross-examination by counsel for the third respondent.

In attacking this finding, Mr. Inamdar relied heavily on the English case of *Merchants, and Manufacturers Insurance Co. Ltd. v. Hunt*, [1941] 1 All E.R. 123. The judge distinguished that case, but I confess that I do not follow his reasoning. It appears to be a case on all fours with the present. I do not think that the common interest shared by the respondents lets in this evidence as against the second and third respondents, because there was no common interest at the time when the admission was made (*Catt v. Howard* (1820), 3 Stark. 3; 171 E.R. 747). Also, with respect, I do not think the alternative reason was valid. Cross-examination may sometimes let in evidence which would not be admissible in examination in chief, but here the cross-examination took place after objection had been taken to the admission of the evidence and, moreover, was only directed to the right of the witness to refresh his memory from a written record, not to the substance of the evidence. In any case, the evidence was clearly inadmissible against the third respondent. I know of no authority for saying that the opportunity, not exercised, to cross-examine can make admissible evidence that is otherwise inadmissible and, for my part, I would have no hesitation in rejecting that proposition.

The judge also said, in this context, that he thought a reasonable inference could be drawn from the police officer's evidence that the first respondent was both the owner of and driving the car at the material time. With great respect, I cannot agree. Once the first respondent's statements are excluded from that evidence, what remains is, in my opinion, inconclusive as to the ownership or the driving of the car.

If I understood him correctly, Mr. Nazareth was prepared to concede that this evidence was not admissible against the second and third respondents as an admission by the first respondent but he submitted that it was admissible as part of the res gestae. He argued that the admission was a statement made by a participant against his interest and made shortly after the occurrence and he referred (*inter alia*) to *Davies v. Fortior Ltd.*, [1952] 1 All E.R. 1359.

Mr. Talati, who appeared for the third respondent, and who addressed the main reply on the cross-appeals, submitted that the admission was not admissible as part of the res gestae, because it had not been shown to be contemporaneous or substantially contemporaneous with the event to which it related, that is, the accident of November 1, 1964. The police officer said that he went to the scene of the accident and he there spoke with the first respondent. He did not say when this happened. It might well have been a considerable time after the accident. There was nothing even to show, and it could not be assumed, that the first respondent had remained on the scene; he might have gone away and returned later. There was nothing. therefore, to show that the admission was a spontaneous remark substantially part of the occurrence. It might well have been, and probably was, a mere report of a past occurrence. Unless it could be admitted as an admission, the evidence of it was mere hearsay and ought to have been rejected. Mr. Talati referred to *Tustin v. Arnold & Sons* (1915), 84 L.J.K.B. 2214, in which Bailhache, J., said:

> "In this case the res gestae was a single act – namely, the collision with the motor car. In such a case words, even spoken words, do not become part of the res gestae, unless they are made at the time and are the natural

> consequence of the collision – words which spring out of the fact of the collision, so to speak – inevitably and almost without the will of the speaker, and are, at any rate, spontaneous."

Applying that test, and so far as I am aware it has never been overruled, there is no evidence whatever to show that what the first respondent said to the police officer was spontaneous or even that it was said at or immediately after the time of the accident. In my view, it is clearly not part of the res gestae.

If, as I think, the evidence of what the first respondent said to the police officer was not admissible against the second and third respondents, either as an admission or as part of the res gestae, there is no evidence that the first respondent was driving the vehicle at the time of the accident of November 1, 1964, and it follows that the appellant company failed to prove as against the second and third respondents, that the first respondent's statement was untrue. I think, therefore, that the second ground of the cross-appeals of the second and third respondents is entitled to succeed.

The third ground of appeal, that the learned judge had erred in admitting as evidence against the second and third respondents answers given by the first respondent to interrogatories was not seriously argued, because it was agreed by counsel that the learned judge had not relied on them in his judgment.

To summarize, I think that this appeal should be dismissed. The cross-appeals would subsequently cease to be material to the main issue between the parties but as they were argued at length and the question of costs arises, I would record that in my opinion the cross-appeal of the first respondent fails. As regards the cross-appeals of the second and third respondents, I think they fail on the first ground but succeed on the second and that it is unnecessary to deal with the third.

I would order that the appellant pay all three respondents their costs of the appeal. I would order the first respondent to pay the appellant his costs of the first respondent's cross-appeal. I would order that the appellant pay the second and third respondents one-half the costs of their respective cross-appeals.

Sir Clement De Lestang Ag P: I agree. The appeal is accordingly dismissed and the appellant will pay all three respondents their costs of the appeal. As regards the cross-appeals the first respondent will pay the appellant its costs of the first respondent's cross-appeal and the appellant will pay the second and third respondents one-half of the costs of their respective cross-appeals.

Duffus Ag V-P: I have read and agree with the judgment of Spry, J.A.

Appeal dismissed.

For the appellant:
JM Nazareth, QC and *CR Doshi*
Patel & Thakkar, Mombasa

For the first respondent:
Ram Hira and *SI Master*
SP Master, Mombasa

For the second respondent:
IT Inamdar
Bryson, Inamdar & Bowyer, Mombasa

For the third respondent:
PS Talati
Talati & Talati, Mombasa

Burunyi and another v Uganda
[1969] 1 EA 123 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	5 August 1968
Case Number:	223 – 226/1968 (144/68)
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Criminal Practice and Procedure – Identification parade – Records conflicting with evidence of identification given at trial – Insufficient degree of accuracy in identification evidence.

[2] Criminal Practice and Procedure – Identification parade – Whether it is an irregularity to have told an identifying witness that there was three suspects on the parade.

[3] Evidence – Identification – Parades held but evidence of officers conducting parade conflicted with evidence of identifying witnesses – Insufficient degree of accuracy in identification evidence.

Editor's Summary

The two appellants were convicted along with two other persons on a charge of robbery. The prosecution case was that the appellants, along with others, entered the compound of Kyere Cotton Ginnery armed with guns, pangas, axes and sticks and by threats of violence, forced several senior members of the staff to lead them to the strong room and open it in order to enable the attackers to take away cash to the value of between Shs. 59,000/- and Shs. 60,000/-. The manager of the ginnery and a cashier both had an opportunity to observe the second appellant and at an identification parade, they pointed out the second appellant as being amongst those who tried to break open the strong room safe. As a result of information given by a co-accused, three savings account books were found in the house of the first appellant and a credit total of Shs. 14,718/25 was shown in them. The grounds of appeal were summarised by the learned judge and were as follows: (*a*) that there was no proper evidence of identification of the two appellants and that therefore the magistrate erred in accepting the evidence of the identification parade as having sufficiently established the appellants as some of the robbers; (*b*) that the magistrate misdirected himself in holding that the appellants had been properly identified as such evidence of identification fell far short of the degree of accuracy required to sustain a conviction in a criminal case; and (*c*) that the magistrate misdirected himself in rejecting the first appellant's explanation as to how he came by the money in his bank. The prosecution conceded that it could not support the conviction of the first appellant.

Held –

(i) the rules governing the conduct of identification parades were duly followed in the conduct of the parades;

(ii) the evidence of the eye-witnesses was unreliable due to lapse of time and the evidence of the identification parade attributed to witnesses what perhaps they never did or which they did but had forgotten;

(iii) there is a strong suspicion that the appellants participated in the robbery but it must remain suspicion;

(iv) both appellants acquitted.

Appeal allowed.

Cases referred to in judgment:

(1) *R. v. Mwango s/o Manaa* (1936), 3 E.A.C.A. 29.

(2) *Lekuiten Ole Legitti and three others v. Republic*, Criminal Appeal No. 105 of 1967 (unreported).

(3) *Kella and Another v. Republic*, [1967] E.A. 809.

(4) *Ssentale v. Uganda*, [1968] E.A. 365.

Judgment

Sir Udo Udoma CJ: The two appellants Juma Burunyi and Mulema s/o Muwonge were together with six other persons charged with and tried of robbery contrary to s. 272 and punishable under ss. 272 (2) and 274A of the Penal Code by the Chief Magistrate, Soroti.

In his judgment the magistrate found four of the accused persons not guilty, acquitted and discharged them. The appellants together with two other accused persons with whom this court is not concerned in these proceedings were convicted and sentenced each to ten years' imprisonment and twelve strokes of the cane. Thereafter the appellants appealed against their conviction and sentence.

Before dealing with the grounds of appeal filed I consider it would be helpful to recapitulate briefly the case of the prosecution against the appellants as well as of the appellants, defence.

The case of the prosecution was that on January 17, 1967, at about 1 a.m. Vithaldas Bhovan Ruparelia the manager of the Kyere Cotton ginnery was asleep in his house with his family when he was woken up by the sound of two gun shots fired inside the ginnery compound, where he lives with his family. The compound of the ginnery was well lit. There were a number of security lights so that it was possible to see any one in the grounds.

Then on looking into the compound from his room Ruparelia saw a big crowd of Africans who were armed with pangas, axes, guns and sticks shouting and coming towards the direction of his house. On reaching his house, the crowd broke the door and entered therein. They caught hold of him and demanded from him the key of the safe containing the ginnery money and threatened him saying that they had come there to rob the ginnery.

Ruparelia told them that he was not the keeper of the key nor was he in possession of it; and that the key was usually kept by the cashier of the ginnery. The crowd, having caught hold of him, tied him up with a rope. On the order of the crowd Ruparelia led them to the cashier's house. The cashier who kept the key of the safe at the time was Vallabhdas Juthabhai Masaru.

In the meantime when Girdhar Mulla Raithatha, the Director of the ginnery, saw Ruparelia being beaten, he came out of his house to render him assistance and to appeal to the crowd not to kill him. As soon as the crowd saw him they also caught hold of him and had him tied up with a rope. On enquiry Ruparelia told him that the crowd had demanded from him the key of the safe containing the ginnery money. Just at that time the nightwatchman Nikolas Olal was also held and tied up with a rope by the crowd.

Raithatha advised Ruparelia to let them have the key. Thereupon Ruparelia under compulsion first led the crowd to the house of Kalidas Girdharbhai, also a cashier of the ginnery in the belief that the key of the safe was in his possession. He pleaded with Girdharbhai ro release the safe key to the crowd for otherwise he was in danger of being killed. Girdharbhai who was then inside his house, came out into the compound. He saw Ruparelia, Nikolas Olal and Raithatha tied with ropes. He explained that the key was not with him. Immediately the crowd also pounced upon him and also tied him up with a rope.

Ruparelia was compelled to lead the crowd to another cashier of the company responsible for keeping

the key of the safe. On arrival they met only Shatokben Vallabhdas Masaru, the wife of Masaru, the cashier. The latter was in hiding on seeing the crowd. As soon as the door of the house was opened, a member

of the crowd rushed therein and demanded the key. Shatokben handed over a bunch of keys to the man as a representative of the crowd. It was a bunch of keys containing the keys to the cash office and the strong room. Shatokben was assaulted by the crowd, dragged on the ground for a distance of about fifty yards and threatened with a panga.

Thereupon the armed crowd marched Ruparelia and the others who were tied with ropes like prisoners to the cash office. The cash office had two doors, the outer and the inner doors. The outer door was made of expanded metal and the inner door was wooden. The armed crowd broke open both the outer and inner doors with their pangas and axes. They were, however, unable to break open the strongroom door, whereupon one of them who was holding the bunch of keys handed the same over to Ruparelia and commanded him to unlock and open the door, which the latter did with fear and trembling. Both the cash office and the strongroom were well lit. It was while the crowd were in the cash office and the strongroom that Ruparelia was able to observe clearly the second appellant and another appellant whose appeal was dismissed summarily. In like manner and in the same way Girdharbhai was also able to observe quite clearly the second appellant as well as two other persons in the crowd whose appeals have already been dismissed summarily. At identification parades held at Mbale prison, Ruparelia and Girdharbhai picked out the two appellants and said that they were some of those who tried to break open the small safe within the strongroom.

Immediately the strongroom door was opened about four or five of the robbers rushed into it at the same time. They scrambled for the money, each taking and carrying away as much as he could. All the robbers made good their escape.

In the strongroom at the close of business that day, namely January 16, 1967, there was the sum of Shs. 102,000/-. The robbers being in a hurry were only able to take and carry away the sum of between Shs. 59,000/- and Shs. 60,000/-.

According to the case of the prosecution, Mutono, that is the fifth accused at the trial before the Magistrate, played a prominent role in this case because it was as a result of information received from him and with his assistance that the first appellant was arrested. He led Assistant Superintendent Ogutu to the house of the first appellant, who, on being interrogated denied any knowledge of even Mutono.

Assistant Superintendent Oguto introduced himself to the first appellant; and having arrested him, conducted a search of his house and recovered therefrom three bank savings account pass books. That was on March 2, 1967. One pass book was for the Uganda Commercial Bank, another for the National and Grindlays Bank, and the third was for Barclays Bank – all of Mbale branches. The three savings accounts were in credit and totalled Shs. 14,718/25. There was also found in the house of the first appellant a receipt for the sum of Shs. 851/- paid to Barkats', Motor Ltd. on February 1, 1967.

In the course of their investigation the Police conducted a series of identification parades. In particular the identification parades were conducted by Assistant Inspector of Police Tibahingurwa, Detective Sergeant Baraza and A.S.P. Amucu.

Having been arrested, charged and cautioned the first and second appellants volunteered statements to the police. The first appellant's statement was made on March 7, 1967, and therein he gave details of how he came by the large sums of money found as standing to his credit in the three banks already named. The first appellant was arrested on March 2, 1967. The second appellant was arrested on February 2, 1967, and he made his statement

on February 9, 1967, denying having been concerned in robbing the Kyere ginnery on the night of January 16/17, 1967.

In their defence the first and second appellants denied the charge. They made unsworn statements from the dock. In his statement the first appellant virtually repeated what he had told the police. He however added that he took part in identification parades and that those who identified him did so because they had seen those concerned in the case already. The second appellant merely adopted his statement to the police.

In his judgment the learned trial Chief Magistrate, after a review of the evidence, accepted the case of the prosecution against the appellants. He rejected the explanation given by the first appellant as regards the sources of the money found in his savings bank accounts. He convicted him as well as the second appellant.

There were two separate sets of grounds of appeals. The twelve grounds were argued together by Mr. G. K. Patel, for the appellants' as the grounds raised the same or similar issues, and may be summed up under three main heads as follows:

(1) That there was no proper evidence of identification of the two appellants. Therefore the Magistrate erred in accepting the evidence of identification parade as having sufficiently established the appellants as some of the robbers who raided Kyere Cotton Ginnery in the night of January 16/17, 1967.

(2) That the Magistrate misdirected himself in holding that the appellants had been properly identified as such evidence of identification as there was fell far short of the degree of accuracy required to sustain a conviction in a criminal case.

(3) That the Magistrate misdirected himself in rejecting the first appellant's explanation as to how he had come by his money in the bank.

On the first, second and third grounds of appeal, counsel for the appellants referred the court to a passage in the evidence given by Assistant Inspector Tibahingurwa and submitted that for a police officer conducting an identification parade to have told an identifying witness that there were three suspects in a parade and that he should walk up and down to see whether he could recognise any one of them was such a fundamental irregularity that it had vitiated the parade.

It was further contended by counsel that there was no evidence that records of the identification parades held were kept; nor were the names of volunteers given; and that the police did not give evidence as to whether or not the witnesses for the prosecution gave descriptions of the robbers when the matter was first reported to them. That being so, the Magistrate was wrong in law to have convicted the appellants.

In support of these submissions the court was referred to an unreported case decided by the Court of Appeal for East Africa, *Lekuiten Ole Legitti and Three Others v. Republic* (Criminal Appeal No. 105 of 1967) and to *Kella and Another v. Republic*, [1967] E.A. 809.

On the other hand Mr. Khan, State Attorney, in his submission conceded that there was insufficient evidence to sustain the conviction of the first appellant but that there was an abundance of evidence against the second appellant. He submitted that he was not prepared to support the conviction of the first appellant but that the court should uphold the conviction of the second appellant because both Girdharbhai and Ruparelia in their evidence had sworn that on the night in question they had clearly seen him among the robbers.

On the question of irregularity in the conduct of the identification parade, counsel contended that any attack on the police in this respect was groundless

and that the police had followed the rule of practice which was quoted with approval by the court in *Ssentale v. Uganda*, [1968] E.A. 365.

As regards the point made concerning the conduct of Assistant Inspector Tibahingurwa it is difficult to see how the remarks made by the Inspector to one Tulsidas, who incidentally was not even called by the prosecution as a witness during the trial of this case, could have in any way been prejudicial to either the first or second appellant. Tulsidas could not and did not identify anyone during the parade. In fairness to Assistant Inspector Tibahingurwa this was what he said on this point:

> "I arranged three parades on that day [that is, on February 7, 1967]. A.2 is the only one who took part in the first parade. All the other accused were not there. There were nine witnesses to identify A.2. A.2 stood seventh in the line. I told him that there were some witnesses who had seen him at the robbery and that they were coming to identify him. He agreed to take part. I called on Tulsidas of Bugondo. I told him there were three suspects in the parade. I asked him to walk up and down the line and touch anyone he recognised. He was unable to pick out any one."

The witness then went on to say that thereafter he invited Girdharbhai of Mbale, Osinge and Dinka P. Patel of Bugondo and all of them failed to identify the second accused or any one else. It is therefore unfair to have attacked the conduct of this particular parade in the manner in which the counsel did.

It was only at the second parade which was held at 3 p.m. that the second appellant was present and took part. In that parade there were sixteen volunteers, and in so far as these appeals are concerned the suspects, A1, A.5 and the second appellant. The suspects who were identified at that parade and the names of the witnesses who identified them were recorded and given in evidence at the trial. Although Tibahingurwa does not appear from the record to have stated that the second appellant was picked out by any one of the identifying witnesses it is recorded as having been sworn to by him, that the second appellant actually complained after the parade that they had been seen by the witnesses for the prosecution at the Police Station before the conduct of the parade. The question then is, if the second appellant was not identified at the parade how came he and then the fifth accused to make such a complaint?

The next witness who conducted an identification parade was Detective Sergeant Baraza. He said that on March 6, 1967, he held an identification parade at Mbale Police Station; that he had twelve volunteers and two suspects, namely A.6 (that is, the first appellant and another man with whom we are not concerned); that he explained to the two suspects the purpose of the parade and they agreed to take part in it; that A.6 stood as number 3 and the other man as number 4; that he had eight witnesses in all; that when Akenda Obwangor arrived at the parade, he inspected it and immediately picked out A.6 (first appellant); that Ruparelia could not pick out any one; but that Goro on picking out A.6 (first appellant) had said "I have identified this man because I saw him at the ginnery on the day of the robbery – he had a panga and a stone;" that the first appellant was also picked out by Osinge who, on touching him had said: "I recognise the accused as one who took part in the robbery".

It is necessary to point out that throughout the trial Akenda Obwangor was never called as a witness, the reason for which is obscure. On the other hand the Magistrate accepted the evidence of Nikolas Olal who said that he saw the first appellant quite clearly that night.

Then there was the oral testimony of Girdharbhai and Ruparelia who gave eye witnesses' account of the conduct of the robbery. In his evidence Girdharbhai swore that the second appellant was one of the robbers he clearly

recognised as having taken part in the robbery; he stated that at the time he saw the two appellants the latter had in his hand a hammer with which he tried unsuccessfully to open a small safe which was inside the strongroom; and that he had identified him at a parade held at the Mbale Prison between twenty and twenty-five days later. Similarly Ruparelia swore that, among the robbers, he was able to identify the second appellant on February 7, 1967, at an identification parade held that day.

It is noteworthy that in his judgment the Magistrate discredited this piece of evidence given by Ruparelia saying that the witness was suffering from "fading" memory.

I have examined the two Kenya cases to which I was referred. With respect I agree with the decisions in both cases. But I do not think that they are directly relevant to the problem posed by this case. The problem here is not whether the identification parades were properly conducted; of that there can be no doubt at all. I am satisfied that the rules governing the conduct of an identification parade which were approved and applied by this Court in *Ssentale v. Uganda*, as laid down in *Rex v. Mwango s/o Manaa* (1936), 3 E.A.C.A. 29, were duly followed in the conduct of these parades.

The real question at issue in this case is that whereas some of the witnesses for the prosecution swore that they had actually seen the first and second appellants in the act of robbery in the night of the incident, evidence of identification, on the other hand does not support them. Instead evidence of identification indicates that it was some other witnesses who, in their testimony at the trial, did not state that they had seen and identified the first and second appellants, did do so. The reason for this is not easy to come by. It is, of course, quite possible that the records kept by the officers who conducted the parade might have been faulty. Take for instance, the evidence given by Tibahingurwa as to his conduct of the identification parade. There is no positive evidence that Girdharbhai as a witness, who was not even shaken by cross-examination, and Ruparelia did at any time on February 7, 1967, identify the second appellant, yet the report contains the assertion that the second appellant had complained to Tibahingurwa that those who identified him had done so because they had previously seen him at the police station.

In the parade conducted by Detective Sergeant Baraza on March 6, 1967, it is stated that the first appellant was identified by one Akenda Obwangor, not called as a witness, Goro and Osinge who, in their evidence, never stated that they had either seen or identified him at any time. Similarly Nikolas Olal who swore that he had seen the first appellant at the scene of the incident was not even summoned or invited to attend the parade.

This court now finds itself on the horns of a dilemma – a situation which I should have thought, with respect, must have faced the Magistrate, who in my view, made a very good job of this difficult case.

The dilemma is this: Which evidence is the court to accept? Should it be the evidence given by eye-witnesses several months after the event, one of whom confessed to have a "fading" memory, which disability was accepted by the Magistrate: or the evidence of identification parades which attributed to witnesses what perhaps they never did or which they did but had forgotten, because of the lapse of time? The offence was committed in January, 1967. The trial took place from December, 1967 and was concluded in March, 1968.

When a court of law is faced with a situation such as I have described, can it be said that the prosecution has discharged the onus which is upon it of proving the guilt of the appellants beyond reasonable doubt? I think not. It is not the duty of the court to "stage manage" cases for the prosecution; nor is it the

duty of the court to endeavour to make a case against an accused person where there is none.

In a criminal case the court cannot enter into the arena. The duty of the court is to hold the scale to see that justice is done according to law on the evidence before it. Having made a very careful study of the record in this case, I have a strong suspicion that the appellants participated in the robbery which took place at the Kyere Cotton ginnery. But suspicion upon suspicion must remain suspicion.

In all the circumstances of this case, I have most reluctantly come to the conclusion that the prosecution had failed to discharge that onus, which is always upon it, of proving beyond reasonable doubt that the appellants were guilty of the offence of which they were convicted. These appeals are therefore allowed; and the conviction and sentences quashed. The appellants are acquitted. It is ordered that they be forthwith released.

Order accordingly.

For the appellants:
GK Patel
Girish K Patel, Mbale

For the respondent:
AM Khan
Director of Public Prosecutions, Uganda

Avone v Uganda
[1969] 1 EA 129 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	4 November 1968
Case Number:	88/1967 (150/69)
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Criminal Practice and Procedure – Charge – Citing wrong and non-existent sections of Penal Code – No miscarriage of justice – Appeals dismissed.

[2] Criminal Practice and Procedure – Sentence – Forgery – And personation of Deputy Minister – One year increased to three years on appeal.

Editor's Summary

The appellant by pretending to be the Deputy Minister of Health, got a police patrol car to take him from

Kampala to Entebbe and accommodation at an hotel for which he did not pay. He signed himself in the hotel register with the name and description of the Deputy Minister. He was charged with three counts, one of obtaining credit by fraud, one of forgery, and one of personation. The charge misdescribed the sections of the Penal Code under which two of the counts were laid. The appellant was convicted on all three counts and sentenced to one year's imprisonment on each count. He appealed.

Held –

(i) the misdescriptions in the charge had not prejudiced the appellant and the convictions should stand;

(ii) the sentences were insufficient and should be increased in the case of forgery to three years' imprisonment.

Appeal dismissed. Sentence increased.

No cases referred to in judgment

Judgment

Sir Udo Udoma CJ: The charge against the appellant consisted of three counts, namely, obtaining credit by fraud contrary to s. 292 (*a*) of the Penal Code; forgery contrary to s. 326 of the Penal Code; and personation contrary to s. 360 (1) of the Penal Code. He was tried, found guilty, convicted and sentenced to one year's imprisonment on each count to run consecutively. This appeal is against conviction and sentence.

The facts of the case summarised are these: John Arichemado, Assistant Inspector of Police, was on duty in the Police Information Room on the night of August 16, 1966. At about three o'clock in the morning of August 17, 1966, he received a telephone call from Mulago hospital. It was a 999 call. The appellant spoke to him. He introduced himself as the Deputy Minister of Health, Semeo Uringi, stationed at Entebbe. He then reported that his car had broken down; and that he had no means of returning to Entebbe. He requested that a patrol car be sent to collect him at Mulago hospital and take him to Entebbe. The appellant also requested that arrangements be made to have accommodation reserved for him at the Lake Victoria Hotel, Entebbe, for the night.

In obedience to the instruction, Assistant Inspector Arichemado immediately directed a Police Patrol car under the command of Corporal Mukoli to proceed at once to Mulago hospital and there to pick up the appellant and to drop him at the Lake Victoria Hotel, Entebbe. Furthermore, as requested, Assistant Inspector Arichemado rang up the Lake Victoria Hotel and reserved accommodation for the appellant. On arrival at the hotel, the appellant rang up the Police Information Room and gave instructions that the Police Patrol car should come back to collect him and take him back to Kampala later that morning. That call was made by the appellant while at the hotel at Entebbe, at about 4 a.m. on August 17, 1966.

Corporal Mukoli carried out the instructions he was given. He collected the appellant from the casualty department of the hospital and drove him to the Lake Victoria Hotel. Before picking up the appellant as soon as he arrived at Mulago hospital casualty department, the appellant came out and said to Corporal Mukoli "You bloody hell why are you late?" Corporal Mukoli, believing the appellant to be the Deputy Minister, Mr. Uringi, whom he had never met before, saluted him and opened the door of the car for him to enter, which he did. Corporal Mukoli drove the appellant that early morning hour to the Lake Victoria Hotel.

On the way to Entebbe at a traffic light junction when the driver of the vehicle slowed down his vehicle, the appellant shouted at him saying: "Don't you know that I am a big man, don't you have a bell?" At his request the inside lights of the car were switched on, as he said that he wanted to do some work in the car. On his instruction the car was being driven at a speed of about ninety m.p.h. as the appellant told the police that if the car was being driven slowly he might be shot at. The car eventually arrived at the Lake Victoria hotel at about 3.30 a.m. where the appellant was discharged. Just as Corporal Mukoli was about to leave, the appellant instructed him to inform the Inspector General of Police, Mr. Oryema, that he would require the car to take him back to Kampala later in the day. The appellant also requested Corporal Mukoli to let him have his police pocket diary. The latter surrendered the diary to him and the appellant recorded therein "come back tomorrow at eight a.m."

The appellant was received at the hotel by the Receptionist Wenys Ikwaabu at whose request the appellant signed the register of the residents of the hotel after having filled in and signed the usual form. He therein described himself as Semeo Uringi, Deputy Minister. The portion of the register signed by the

appellant was exhibited in the proceedings. It was indicated in the Register that

Room No. 9 was reserved for him. The appellant accordingly occupied the said room for the night. Prior to retirement the appellant made two telephone calls, one of which was to the Police Station, Kampala. He was charged Shs. 3/- for the two calls that early hour of the morning. The appellant spent the rest of the night in Room 9 in the hotel.

At about 9.25 a.m. on August 17, 1966, the appellant went downstairs to Festus Basiye, the telephone operator employed in the hotel. He made three telephone calls, one to No. 2514, the other to No. 3001 and another to the Police Station, Kampala for which he was charged a total sum of Shs. 4/50 at Shs. 1/50 for each call. The total debt incurred by the appellant for bed and breakfast and telephone calls came to a total of Shs. 68/75. He checked out of the hotel without telling anybody and without settling his bill.

The result was that the assistant manager of the hotel, believing that the appellant was in fact Mr. Uringi, Deputy Minister of Health in the Ministry of Health, on examination of the register of residents of the hotel made up the bill for the sum of Shs. 68/75, and forwarded the same by post to Mr. Uringi. On receiving the bill, Mr. Uringi queried it and returned the same to the hotel pointing out that on the night in question he was at Soroti and could not possibly have spent the night at the Lake Victoria Hotel. The matter was thereupon reported to the Police. As a result the appellant was tracked down and prosecuted on the three charges of which he was convicted.

In his defence the appellant testified that on November 19, 1966, he had received a production warrant commanding him to appear on November 23, 1966, for the case; and that he was then serving a sentence of imprisonment at Arua. He denied having impersonated Mr. Uringi and having known any of the witnesses who had testified for the prosecution in the case.

The appellant appeared at the hearing and argued his appeal personally. He attacked the witnesses for the prosecution and the evidence given by them. He then submitted that the learned trial Chief Magistrate erred in law in not calling the driver of the Police patrol car, who would have been in a better position to identify the person who was driven by him in the Police patrol car to Lake Victoria Hotel. The appellant also contended that there was no identification parade conducted by the police before the trial.

The question of identification parade can be ruled out as the witnesses for the prosecution testified that the appellant was the person who was driven in a Police patrol car from Mulago hospital to Lake Victoria hotel in the night of August 16/17, 1966. The evidence is also clear that the appellant had that night impersonated Mr. Uringi, and by such impersonation had obtained Police service and a free ride to the Lake Victoria hotel on a Police patrol car, and thereafter obtained board and lodging in the said hotel on credit. In the register of the hotel the appellant had described himself as Semeo Uringi, Deputy Minister of Health in the Ministry of Health in the Government of Uganda.

Before dealing with the appeal on its merits, it is necessary to point out that s. 292, under which the first count was laid, comprises three distinct and separate subsections. It is not stated in the charge, nor does the Magistrate mention in his judgment, the subsection under which the charge was laid and the appellant convicted. The three subsections deal with entirely different circumstances. The proper subsection under which the charge ought to have been laid should have been subsection (*a*) and the count would therefore have read:

> Obtaining credit by fraud contrary to S. 292 (*a*) of the Penal Code;

Similarly in respect to the second count there is no section of the Penal Code known as s. 326 (1). There is only one section of the code, which deals with general punishment for forgery and that is s. 326 of the Penal Code. Thus the

charge was under a non-existent section of the Penal Code. In the same way in laying the charge under the third count it is not specified under which subsection of s. 360 the charge was laid. Section 360 has two subsections numbered (1) and (2). The only subsection which fits into the evidence which emerged from the proceedings would be subsection (1), and therefore the correct charge should have been laid under s. 360 (1) of the Penal Code.

It is a matter for considerable surprise that the learned trial Magistrate did not trouble to see that the charges as laid were correct before even trying the case. These ommissions are quite serious and it is incomprehensible how a Magistrate could assume jurisdiction to try an accused person on a section of the law which does not exist, or convict an accused person under a section of the Penal Code comprising several subsections without indicating the subsection of the section of the Penal Code under which an accused person was convicted. It is even more serious that a State Attorney appearing before the court to oppose an appeal does not take appropriate steps to satisfy himself that the charge under which an accused person was convicted was correctly laid under the appropriate section of the Penal Code. It is the primary duty of a Magistrate to satisfy himself that the section of the Penal Code under which an accused is charged is correct before assuming jurisdiction to try the case.

I am however prepared to overlook these serious lapses on the part of the prosecution and the learned trial Chief Magistrate because I am satisfied that the appellant in the instant case was in no way prejudiced by these lapses. The appellant fully understood the substance and the essence of the charges against him. In my view no miscarriage of justice has been occasioned by these lapses.

On the facts I accept the findings of the learned trial Chief Magistrate that the:

> "accused did not want to pay the bill. I have no doubt in my mind that, the accused is the person who was picked up at Mulago hospital, brought to Entebbe, signed the register of the hotel calling himself Mr. Uringi, the Deputy Minister of Health. The prosecution has proved its case on the three counts and I convict the accused in all three counts as charged."

It is impossible to hold that these findings were unreasonable or that there was no evidence to support them. On the contrary, the evidence against the appellant was overwhelming. In his defence the appellant made no attempt to deal with the points of substance established against him by the witnesses for the prosecution. This appeal as to conviction is therefore dismissed.

On the other hand it seems clear that the sentences passed on the appellant were bad in law. The three counts of which the appellant was convicted arose out of the same transaction. The Magistrate was wrong in law to have ordered the sentences to run consecutively. In my view, apart from the fact that the sentences were bad in law, the sentences were so inadequate as to amount to a miscarriage of justice. The offences committed by the appellant and of which he was rightly convicted were of a grave and daring nature. Besides the appellant has a very bad record, two of which are of obtaining money by false pretences, and the last one of personating a public officer for which he was sentenced to twelve months' imprisonment on February 13, 1965.

The sentences imposed upon the appellant by the learned trial Chief Magistrate are set aside. I accept the submission of Mr. Khan that deterrent sentences are called for. The following sentences are to be substituted therefore: The appellant is sentenced to:

(*a*) One year's imprisonment on the first Count (obtaining credit by fraud);

(*b*) Three years' imprisonment on the second Count (forgery); and

(*c*) One year's imprisonment on the third Count (personation).

All sentences to run concurrently and to date from the date in which the appellant was convicted by the Magistrate and committed to prison.

Order accordingly.

The appellant in person.

For the respondent:
AM Khan (State Attorney, Uganda)
Director of Public Prosecutions, Uganda

Mbui v Thairu and another
[1969] 1 EA 133 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	16 February 1968
Case Number:	194/1967 (155/68)
Before:	Harris J
Sourced by:	LawAfrica

[1] Advocate – Other party – Advocate visited by other party – Observations as to advocate's duty in general and not to mislead other party in particular.

[2] Civil Practice and Procedure – Setting aside – Ex parte judgment – Judgment on formal proof in default of appearance – Defendant unintentionally misled by conversation with plaintiff's advocate into believing appearance not necessary – Judgment set aside – Civil Procedure (*Revised*) *Rules* 1948, *O.* 9, *r.* 10 (*K.*).

Editor's Summary

The plaintiff sued the defendant for damages for breach of an alleged agreement to sell land. The defendant having been served with the summons himself visited the plaintiff's advocate on two occasions, once before and once after the time for entering an appearance had expired. As a result of his conversation with the plaintiff's advocate the defendant was left under the impression that, since he and the plaintiff were clearly in conflict regarding the dispute, the matter would in due course come on for hearing before the Court so that each party would have an opportunity of being heard. The defendant did not realise that he should enter an appearance, and he did not do so. The case was therefore set down for formal proof and was heard in his absence. Judgment having been given against him, the defendant

applied to have it set aside.

Held – in the circumstances the judgment should be set aside.

Observations as to the duty of an advocate who is visited by an adverse party.

Application allowed.

No cases referred to in judgment

Judgment

Harris J: This is a motion brought by the first defendant on notice to the plaintiff for an order setting aside a judgment passed *ex parte* by this Court on May 12, 1967, in favour of the plaintiff against both defendants. The second defendant is not a party to this application.

In his plaint, which was filed on February 21, 1967, the plaintiff claimed as against the first defendant damages for alleged breach of an agreement for the sale by that defendant to the plaintiff of certain lands, together with specific

performance of the agreement. As against the second defendant the plaintiff claimed damages for the loss said to have been occasioned to him through the refusal of that defendant to hand up the instrument of agreement for sale of the lands. Appearance was due by not later than March 25 but none was entered on behalf of either defendant; and on May 12, 1967, the matter came on *ex parte* for formal proof when, having heard oral evidence, the Court gave judgment awarding the plaintiff as against the first defendant a decree for specific performance with damages amounting to Shs. 1200/- for breach of contract, and as against the second defendant damages amounting to Shs. 100/-.

The principal ground relied upon in support of the motion is the allegation that the first defendant, upon being served with the summons in the action, went to the office of the plaintiff's advocates and discussed the claim with them, denying that he had ever agreed to sell the premises, whereupon the advocates told him that they "would have to leave the matter to be decided by the Court", from which expression the defendant says he concluded that the matter would not come on for hearing without notice to him. Unfortunately, as already stated, neither of the defendants had entered an appearance in the proceedings with the result that, upon the action being shortly afterwards set down for formal proof, they were not notified and did not attend.

The applicant, in an affidavit which had not been expressly controverted, set out the facts mentioned above and said that he first came to know of the *ex parte* decree when, some time later, he received a notice to show cause why one-third of his monthly salary should not be attached in execution. This assertion gains some support from the Court file which discloses that when the notice to shew cause came for hearing before Rudd, J. on October 26, 1967, the applicant attended in person and stated that the matter did not concern him and that he had not appeared in the proceedings, whereupon the learned Judge adjourned the hearing until November 27, to enable the applicant, if he so wished, to bring the present application. Furthermore, the plaintiff has filed an affidavit by a member of the firm of advocates acting for him in which the deponent states that the defendants saw him at his office twice during the month of March, 1967 but that on neither occasion did he give them the impression that they would be informed of the hearing date either by him or by the Court, and when the advocate says that he did not give the applicant such an impression I must take that to mean that he did not consciously do so, for clearly the advocate would not be in a position to state affirmatively other than as a matter of inference what particular impression formed itself in the mind of the applicant. Approaching the matter in this way I have no hesitation in accepting as substantially correct what has been told to the Court by each party as is set out above.

The position of an advocate who, while engaged on behalf of a client in litigious proceedings, is visited by a party to those proceedings whose interest is adverse to that of his client and who, not being professionally represented, proceeds to discuss the proceedings with the advocate, may sometimes call for considerable circumspection on the latter's part. If that other party, having received a letter of demand from the advocate for payment of a debt due to the client, were to make an unqualified tender of payment of the sum claimed, clearly it would be improper for the advocate to decline to accept the payment offered, while if the other party were to dispute the liability imputed to him in the letter of demand there might be nothing wrong in the advocate discussing the position with him impartially for the sole purpose of clearing up any misunderstanding on the part of the other party as to the facts surrounding the matter. In this latter case, however, the advocate should take care that nothing said by him is capable, however unintentionally, of misleading the other party

and, indeed, in many cases it might be his duty to suggest to him that he would be well advised either to confer with the officials at the registry of the appropriate Court or to consult another advocate and to warn the other party of the possibility of the suit being heard and determined in his absence. In assessing the nature and extent of his obligations in any such case the advocate will bear in mind that he is an officer of this Court and, as a matter of prudence, he may think fit to make a written record of the interview, furnishing a copy to the other party.

In the present case I am satisfied on the evidence that, although nothing which the advocate for the plaintiff said was intended to mislead the defendant, the latter in fact was left under the impression that, since he and the plaintiff were clearly in conflict regarding the dispute the subject of the suit, the matter would in due course come on for hearing before the Court so that each party would have an opportunity of being heard. Unfortunately the defendant seems not to have appreciated the provision of the rules of court requiring him, if he wished to defend the proceedings, to enter an appearance. The time for doing this had not expired when, on March 22, he first visited the advocate's office but at the date of his later visit on March 31 the time had already expired and could be enlarged only by the Court. The advocate may not have been aware on either of those occasions that no appearance had been entered and it is clear that he did not draw the defendant's attention to the matter or warn him of the danger in which he stood. These, then, are the circumstances under which the defendant seeks to have that judgment set aside.

It is no part of the duty of this Court to come to the assistance of a litigant who, primarily through his own default, finds himself in a difficulty such as that now facing the defendant, and if I were persuaded that the position here is attributable in the main to the carelessness or inactivity of the defendant I would have little hesitation in dismissing this application. On the facts which I have outlined, however, I am satisfied that the defendant at the material time was under a bona fide misapprehension which was not of his making, as to the necessity for him, notwithstanding his visit to the plaintiff's advocate's office on March 22, to enter a formal appearance in the suit within the next three days in order to effectively preclude the plaintiff from applying for judgment in default of appearance. I think it is unfortunate that the plaintiff's advocate did not satisfy himself at the meeting on March 22 as to whether the defendant was aware of the position for, had he done so, the present application might never have had to be made.

In all the circumstances I consider that, in the exercise of my discretion, I should grant the application, set aside the decree, and extend until one week from this date the time within which the applicant may enter an appearance. This will allow him a further period of fifteen days for the filing of his defence.

I am fortified in my views on this matter by the fact that although, when the suit came on for hearing by way of formal proof, the learned trial judge, as appears from the record, was informed that the defendant had been served with the usual summons to enter appearance, there was in fact no proper affidavit of service of the summons before the Court for none had or has yet been filed. At the hearing before me, however, counsel for the applicant has conceded that his client was duly served, as indeed has the applicant himself in his affidavit, with the result that this matter has now no relevance except to the extent that clearly, if the learned judge had been made aware of the absence of an affidavit of service on the hearing of the formal proof, he would not have granted the decree.

The costs of each party of the application will be costs in the cause and such of the plaintiff's costs as may have been thrown away by reason of the order

hereon shall be paid by the plaintiff. The decree as against the second defendant will remain unaffected by this order.

Order accordingly.

For the plaintiff:
HD Trivedi
Trivedi & Trivedi, Nairobi

For the defendant:
RD Menezes
Waruhiu & Co, Nairobi

John v Republic
[1969] 1 EA 136 (HCT)

Division:	High Court of Tanzania at Mwanza
Date of judgment:	17 May 1968
Case Number:	114/1968 (159/68)
Before:	Seaton J
Sourced by:	LawAfrica

[1] Criminal Law – Unlawful possession – Prohibited liquor – "Moshi" – Appellant with another man – Other had bottle of "moshi" – Appellant smelling of "moshi" and resisting arrest – Whether appellant "in possession" of "moshi" – Penal Code (*Cap.* 16) *s.* 5; *Local Liquor Ordinance, ss.* 36 (1) *and* (2) *and* 47 (*T.*).

Editor's Summary

The appellant was convicted with one B of being in possession of "moshi". The evidence showed that the appellant and B were met by a primary court messenger and a special constable while B was carrying a bottle of "moshi". Both the appellant and B smelt of moshi and the appellant attacked the messenger and the constable when they tried to arrest him and B. On appeal by the appellant:

Held –

(i) to establish constructive possession of the bottle against the appellant there should have been evidence that the appellant had a power of control over B, who was in actual possession of the bottle;

(ii) there was a reasonable doubt as to whether the appellant was in possession of the bottle.

Appeal allowed.

Cases referred to in judgment:

(1) *R. G. v. Antonini bin Mtambara* (1943), I.T.L.R. (Rev.) 271.

(2) *Kamau s/o Njeroge and Mwangi s/o Kanywa v. Reginam* (1954), 21 E.A.C.A. 257.

The appellant did not appear and was not represented.

Judgment

Seaton J: The appellant, accompanied by his co-accused Bundeba, was met by the first prosecution witness, a primary court messenger, and a special constable. Bundeba was carrying a bottle of “Fanta”, one-quarter filled with a liquid subsequently identified by the messenger as containing the prohibited liquor known as “moshi”. The messenger testified to his expert knowledge of this liquor, having investigated several cases previously. The messenger smelt the bottle and he also smelt the breath of the appellant and Bundeba, and recognised the smell of “moshi” in the bottle and on their breaths. When the messenger and the special constable attempted to arrest the appellant and Bundeba on a charge of possessing “moshi”, the appellant produced a knife and attempted to stab them. At the time the appellant and Bundeba were one to two paces apart.

On these facts the learned magistrate convicted both the appellant and Bundeba, who has not appealed. State Attorney has supported the conviction

of the appellant on the grounds that the possession of “moshi” by the co-accused Bundeba, the nearness of the two men when they were met, the fact that both smelt of “moshi”, and the attack by the appellant on the messenger and the special constable, all indicated that the “moshi” was in the joint possession of the appellant and his co-accused.

The appellant was not present at this appeal and was unrepresented, but in his memorandum of appeal he has challenged the propriety of his conviction on the ground that no one saw him either drinking or possessing “moshi”. I put to State Attorney a hypothetical case of two men sharing a packet of cigarettes, one owning the cigarettes and offering out of his packet a cigarette to the second. If the second accepts and smokes a cigarette and returns the packet to the first, its owner, could his having smoked a cigarette from the packet constitute him a joint possessor of the packet of cigarettes? State Attorney considers this illustration not quite analogous. Whether it is or not, I find it difficult to say that it was a necessary conclusion that appellant must have been in joint possession with his co-accused of a bottle of “moshi” merely because his breath smelt of it and he attempted to defend his companion and himself from arrest. It is possible that the appellant may have been drinking “moshi” sometime previously but he was not charged with that. It is also rather clear that he committed an offence in attacking the messenger and the special constable but he has not been charged in this case with assault. For some unexplained reason, the special constable was not called as a prosecution witness.

It is true that s. 5 of the Penal Code contains a definition of “possession” which comprises joint possession where one person has custody or possession with the consent of another. But it was pointed out *inter alia* by Wilson, J., in *R. G. v. Antonin bin Mtambara* (1943), I.T.L.R. (R) 271, there is nothing in s. 47 of the Local Liquor Ordinance which throws on an accused person the burden of proving that the liquor was not in his possession, or was not there with his knowledge, if found on his premises. And it has been held by the Court of Appeal for Eastern Africa that the definition of “possession” in the Kenya Penal Code, s. 5 (*b*) (which is similar to the definition in s. 5 of the Tanganyika Penal Code), is wider than the Common Law doctrine of possession and is applicable only to the term “possession” when that term appears in the said Code. See *Kamau s/o Njeroge and Mwangi s/o Kanywa v. Reginam* (1954), 21 E.A.C.A. 257. It would follow that to establish constructive possession of the quarter-filled bottle of “moshi”, there must have been evidence that the appellant had a power of control over Bundeba, who was in actual possession of the bottle when met by the messenger and the special constable.

The appellant made an unsworn statement denying that he had been in possession of “moshi”. He called a defence witness who really did not advance the case one way or the other since he said he arrived after both men had been arrested and saw neither a bottle of “moshi” nor a knife.

I am of the view that there was a reasonable doubt as to whether the appellant was in possession of the bottle of “Fanta”, and that the appellant should have been given the benefit of this doubt.

Accordingly, the appeal against conviction is allowed. For this reason, I consider it unnecessary to consider whether the sentence of two years’ imprisonment for the possession of such a small quantity of liquor was excessive.

Appeal allowed.

The appellant did not appear and was not represented.

For the respondent:

Mrs A Karim
Attorney General, Tanzania

Rashidi and another v Republic
[1969] 1 EA 138 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	24 October 1968
Case Number:	91/1968 (164/68)
Before:	Sir Clement de Lestang Ag P, Duffus Ag V-P and Spry JA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanzania – Hamlyn, J

[1] Criminal Practice and Procedure – Trial with assessors – Confession – Admissibility challenged by defence – Procedure to be followed.

[2] Evidence – Confession – Onus – Onus of proving admissibility is on prosecution throughout.

[3] Evidence – Confession – Procedure – Where admissibility of alleged confession disputed by defence – "Trial within trial" – Procedure and evidence at – Duty of defence to warn prosecution of challenge in good time.

Editor's Summary

The appellants were convicted of murder upon evidence which included confessions to a justice of the peace. At the trial the defence challenged these confessions while the justice of the peace was testifying about them. The judge then instead of causing the assessors to retire permitted the justice of the peace to be cross-examined as to the taking of the statements and only thereafter did he make the assessors retire and hold a "trial within a trial" during which only the appellants gave evidence, no evidence being called from the police to refute the allegations of trickery and inducement made by the appellants. The judge then ruled the confessions admissible saying in the course of his ruling that the onus of showing that they were inadmissible lay on the accused. On appeal:

Held –

(*a*) the onus is always on the prosecution to prove the admissibility of any statement by an accused person; such onus never shifts to the accused;

(*b*) (i) the correct procedure when a statement is challenged is for the prosecution to call its witnesses and then for the accused to give evidence or make a statement from the dock and call his witnesses, if any;

(ii) here the only evidence at the trial within a trial being that of the appellants it was not possible for the judge to hold that the prosecution had established the admissibility of the appellants' statements beyond reasonable doubt;

(*c*) the correct procedure for dealing with a disputed statement at a trial with assessors (being that laid down in *Kinyori's* case (1)) had not been followed;

(*d*) the confessions ought not to have been admitted; but there being sufficient other evidence the convictions should stand.

Appeals dismissed.

Cases referred to in judgment:

Kinyori s/o Karuditu v. Reginam (1956), 23 E.A.C.A. 480.

Judgment

Sir Clement De Lestang Ag P: delivered the following considered judgment of the Court: The two appellants Juma Rashidi and Mihambo Omari were jointly tried and convicted of the murder of an elderly herdsman called Luhala s/o Mazewa who used to graze cattle belonging to several persons of his village. On a Thursday morning the herdsman left with

his cattle for the grazing ground as usual but failed to return in the evening. A search was organised for him and on the following Saturday his dead body was found in the bush without any trace of the cattle. An autopsy was performed on the dead body by a Government medical officer who expressed the opinion that death was due to cerebral haemorrhage caused by a depressed fracture of the skull which could have been caused by a blow from a blunt instrument inflicted with great force. On convicting the appellants the learned trial judge relied on three matters. First, the fact that at the material time the appellants had exchanged 16 of the cattle which the deceased was grazing with two inhabitants of a neighbouring village for bulls. Second, alleged confessions made by the appellants to a justice of the peace in which they stated that they conspired together and with another man who was not charged with them to steal the cattle from the herdsman by force but each accusing the other for inflicting the deadly injury on the deceased. Third, incriminating statements made by each appellant to the magistrate at the preliminary inquiry in which they admitted participation in the "murder".

There was thus on the face of it abundant evidence to support the convictions. We say on the face of it because it seems to us, and it was indeed conceded by learned state advocate, that the learned judge seriously misdirected himself in admitting the alleged confessions to the justice of the peace and failed to follow the procedure laid down by this court in *Kinyori s/o Karuditu v. Reg*. (1956), 23 E.A.C.A. 480 as being the proper procedure to be followed at a trial with assessors when the defence desires to dispute the admissibility of an extrajudicial statement allegedly made by an accused. What happened in the present case is that while the justice of the peace was testifying to the alleged confessions made to him, the defence advocate intervened to say that the statements were challenged on the ground that the appellants had been tricked by the police and induced to make them and that they retracted them. All this took place in the presence of the assessors and admittedly the fault lies largely with the defence advocate, as had he followed *Kinyori's* case he ought to have informed state attorney in advance that the statements would be challenged and the court would have been apprised of the fact in good time. Be that as it may, on the objection being taken, the court, instead of causing the assessors to retire, permitted the justice of the peace to be cross-examined as to the taking of the statements in their presence. It was only when he had completed his evidence that the assessors were made to retire and the learned judge purported to hold a trial within a trial. This merely consisted of the appellants giving evidence and the prosecution calling no evidence whatsoever after which the learned judge ruled the statements admissible and in his ruling said:

> "It is of course the duty of the accused, if they wish to reject these statements, to show that they were made in circumstances which under the law are not acceptable to this Court."

With respect this is of course quite wrong, the onus being always on the prosecution to prove the admissibility of any statement by an accused person. Such onus never shifts to the accused. Moreover when a statement is challenged it is for the prosecution to call its witnesses first and then for the accused to give evidence or make a statement from the dock and call his witnesses, if any. In the present case this procedure was not followed and, although the defence alleged trickery and inducement on the part of the police, nobody from the police was called to contradict this allegation. The evidence given at the trial within a trial being that of the appellants only, it was not possible for the learned judge to hold that the prosecution had established the admissibility of the appellant's statements beyond reasonable doubt. We think therefore that these

alleged confessions by the appellants to the justice of the peace ought not to have been admitted.

We have considered whether the wrongful admission of those confessions warrants our interfering with the decision against which the appeal is brought. We think not, as in our view there was sufficient other evidence to support the convictions of the appellants and had the learned judge excluded the confessions to the justice of the peace he would inevitably have arrived at the same conclusion. The appeal is accordingly dismissed.

Appeal dismissed.

For the appellants:
TC Kanabar
CA Shah & Co, Tabora

For the respondent:
Borneo (State Attorney, Tanzania)
Attorney General, Tanzania

Sheikh v Gupta and others
[1969] 1 EA 140 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	23 January 1968
Case Number:	916/1960 (169/68)
Before:	Trevelyan J
Sourced by:	LawAfrica

[1] Civil Practice and Procedure – Dismissal of suit for want of prosecution – Whether application properly brought.

[2] Civil Practice and Procedure – Dismissal of suit for want of prosecution – Whether facts justify dismissal.

Editor's Summary

The suit was filed in June, 1960, and fixed for hearing in February. May and October, 1961 and May, 1962, on none of which dates was it heard. The defence was amended and a reply filed in June, 1963. In October, 1963 an application for interrogatories was heard and on November 21, 1964, a bill of costs was taxed. On November 21, 1967, the defendants applied for dismissal of the suit for want of prosecution.

Held –

(i) even if taxation were a step in the action within Ord. 16, r. 6 Civil Procedure (Revised) Rules 1948 the application was properly brought under r. 5 since "defence" in that rule includes an amended defence;

(ii) there had been culpable and flagrant inactivity on the part of the plaintiff and a fair trial could not be had.

Suit dismissed.

Cases referred to in judgment:

(1) *Victory Construction Co. v. Duggal*, [1962] E.A. 697.

(2) *Fitzpatrick v. Batger & Co. Ltd*., [1967] 2 All E.R. 657.

(3) *Saldanha and others v. Bhailal and Co. and others*, [1968] E.A. 28.

Judgment

Trevelyan J: By their application the defendants/applicants applied under "s. 97 of Civil Procedure Act and Ord. XVI rule 6 and such other orders and rules as may apply of the Civil Procedure Rules 1948" for an order dismissing the suit of the plaintiff/respondent for want of prosecution. During the hearing amendment was sought and obtained specifically to refer to rr. 2 and 5 or Ord. XVI. It was done rather hurriedly,

I confess, and I was wrong to have allowed the reference to r. 2 as a perusal of the rule clearly shows. I shall refer to the other two rules as “r. 5” and “r. 6”.

The following is a history of the case. The plaint, for the relatively small sum of Shs. 3,750/- for rent, was filed on June 14, 1960, and the defence thereto was filed on the 16th of the following month. In the September then following, unconditional leave to defend was, by consent, granted on a motion for summary judgment. Two months later the case was fixed for hearing on February 13 and 14, 1961, but was taken out of the list as it would not have been reached that day. It was then fixed for hearing on the following May 15 and 16. Again it was taken out for it could not have been reached. October 26 and 27, 1961, were then fixed for the hearing and the case was first in the list. It should therefore have been possible to hear it, but it was taken out on September 8, the record not assisting us to know why this was done. On February 2, 1962, yet another hearing date, May 15, was by consent fixed for the hearing, but once more, and as early as April 13, it was taken out of the list. Then May 30 and 31 were fixed for the hearing and the case opened on the 30th. But evidence was not taken for, when this was about to be done, the case was adjourned to enable the defence to be amended. On June 5, 1963, the defence was filed and the reply thereto was put in thirteen days later. On October 8, 1963, an application to do with interrogatories was heard, they were then put in and answered on the 30th day of that month and nothing else was done in court save that on November 27, 1964, a bill of costs was taxed and the present application was filed on November 21 of last year.

The point was not taken but it would seem that if taxation is a “step” in the action then the application, insofar as it is based on r. 6, is premature for the rule refers to a three year period and the time lapse in the case is just short of that. But it does not in the result matter for the application is also otherwise based. For instance under r. 5 the application is made at a permissible time. It is true that the rule speaks of a “defence” but I think it must also refer to an “amended defence”. According to Edmonds, J., in *Victory Construction Co. v. Duggal*, [1962] E.A. 697 “The purpose of r. 6 in my view is to provide the court with administrative machinery whereby to disencumber itself of case records in which the parties appear to have lost interest”. If I may say so I have used the rule for that purpose over the years though I leave open the point which was made that you cannot make an application under the rule for only the court can invoke it. I think this to be a proper case, and in the interests of everyone, to deal with the matter without further delay and so, if (though I do not accept it to be so) the application is not otherwise properly before me, then it is to be taken that I decided to invoke the rule myself. After all I had the parties before me and argument lasted all morning.

The claim is now eight years, less four months, old and the plaintiff, so far as the court is concerned, has done nothing for more than three years to say the least. In his affidavit of opposition to the application he (*inter alia*) has this to say:

> “(2) After the filing of interrogatories in Court on October 30, 1963, I instructed Mr. Chawla on more than one occasion to proceed with the case.
>
> (3) I am informed by Mr. P. C. Handa, the partner at present having the conduct of the affairs of the said Kean & Kean that my file relating to the above suit cannot be traced and was perhaps sent to my office, but I have no record of having received the same.

> (4) Last year, during my absence from Kenya my offices were broken into . . . and I am trying to locate the whereabouts of the file if at all it was sent by Messrs. Kean & Kean."

The plaintiff does not tell us when, after October 30, 1963, he made his requests to Mr. Chawla. Unwarrantable delay on the part of the lawyers may well amount to actionable negligence, and on the facts as stated by the plaintiff, probably does so in the instant case, as would the loss of a file with only the possibility that it was sent to a client. And, the affidavits having been sworn in 1967, para. (4) relates to 1966 whilst both that paragraph and para. (3) are shy in disclosing dates. One may, perhaps, wonder whether the plaintiff could have received a file through the post and not know if he received it or not, unless the suggestion is that it may have arrived while he was in England. But even on his affidavit no step was taken between the time when he went, or returned, from England, and the taking out of the application, so far as the court is concerned at any rate. There is either *prima facie* negligence on the part of lawyers or inexcusable delay on the part of the plaintiff or both, on his own say so.

In the *Victory* case the learned judge had this to say (at p. 698 E):

> "However, in deciding whether or not to dismiss a suit under r. 6 it is my view that . . . a court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the defendant will suffer no hardship, and that there has been no flagrant and culpable inactivity on the part of the plaintiff."

There are two later cases to which I shall be referring which must be read with this dictum but using it in relation to the facts of the instant case I cannot say that I am satisfied that the hearing of the suit, which must, with respect, mean a fair hearing of the suit, for it is to be read with the matter of hardship, can proceed without further delay. Relying, I think, on one of the two other cases, the defendants have not provided evidence that their witnesses will not be available (though we have a statement from the Bar about it). Certainly I believe that there has been both culpable and flagrant inactivity on the part of the plaintiff in respect of his smallish claim and that he cannot bring himself within the set of circumstances as stated. It is true that the judge went on to speak of similar inactivity on the part of the defendant but that aspect of the matter was dealt with by Salmon, L.J., in the later case of *Fitzpatrick v. Batger & Co. Ltd.*, [1967] 2 All E.R. 657 and Winn, L.J., agreed with him. With respect I do not see why a defendant should not sit back and await remedies and rights coming to him by operation of law.

In the *Fitzpatrick* case, the matter, as Denning, M.R., put it "went to sleep for nearly two years" in respect of which he said:

> "Only last week . . . I said that it is the duty of the plaintiff's adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. Just consider the times here. The accident was on December 13, 1961. If we allowed this case to be set down now, it would not come on for trial before the end of this year. That would be some six years after the accident. It is impossible to have a fair trial after so long a time. The delay is far beyond anything which we can excuse. The action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution . . . This will not prejudice the plaintiff personally. He has, as far as I can see, an unanswerable claim against his solicitor for his neglect . . ."

Salmon, L.J., said:

> "I entirely agree . . . grossly inordinate delay of the kind which has occurred in this case is quite inexcusable and ought not to be tolerated. It is of the greatest importance in the interests of justice that these actions should be brought to trial with reasonable expedition . . . It is said in this case that the action ought not to be dismissed, because the defendants might have taken out a summons . . . much earlier than they . . . did. They no doubt, however, were relying on the maxim that it is wise to let sleeping dogs lie. They had good reason to suppose that a dog which had remained unconscious for such long periods as this one, if left alone, might well die a natural death at no expense to themselves . . . I am not surprised that they did not apply earlier, and I do not think that the plaintiff's advisers should be allowed to derive any advantage from that fact. The plaintiff is not being deprived of compensation because . . . he has an unanswerable claim . . . for negligence . . . I am quite satisfied that, in the circumstances of this case, where there has been such grossly inordinate delay without any real excuse, the discretion below was wrongly exercised. As far as this case is concerned – each case must turn on its own facts and circumstances – I have no doubt but that the proper order is to dismiss the action for want of prosecution . . ."

Winn, L.J., said:

> "I agree completely with both judgments . . . Salmon, L.J., has used the expression, 'grossly inordinate delay'. I respectfully adopt that expression . . ."

I do not think one ought to, or can, say that any fixed period of time is or is not inordinate delay for each case depends on its own facts and circumstances but the judges on what was before them thought that two years was such delay. Of course, r. 6 refers to three years so the position is not quite on all fours though r. 5 is rather similar to the English rule.

The *Fitzpatrick* case was, as I understand it, relied on and followed by Dalton, J., in *Saldanha and Others v. Bhailal and Co. and Others,* [1968] E.A. 28. On the facts before him he said:

> "I do not see how a fair trial can be obtained after this great delay . . . if the Master of the Rolls was unable to excuse the delay in *Fitzpatrick's* case he most certainly could not excuse the delay in this case."

In the instant case in view of what I have said I too believe that a fair trial is not now to be had and I believe that the suit should be dismissed for want of prosecution. I have not omitted to bear in mind – though I think I was urged not to do so – the matter of limitation, but there are all the other factors to which I have alluded, and, whilst I confess that I prefer to be slow in deciding to dismiss for want of prosecution, I would be exercising my discretion wrongly if I did not order the dismissal. If I may for a moment isolate the point, there is the probability of a successful action against the lawyers, and, it looks as though the plaintiff has not had all that much interest in the case after it finally came before one of my brother judges for trial. However the matter must be looked at as a whole, and having done that, I order that the suit be dismissed for want of prosecution. The order may be made under at least rr. 5 and 6. The defendants will have the costs of the suit and of the application.

Suit dismissed.

For the defendants:
DN Khanna and *TR Johar*
TR Johar & Co, Nairobi

For the plaintiff:
GS Sandhu
GS Sandhu & Co, Nairobi

Pollok House Ltd v Nairobi Wholesalers Ltd

[1969] 1 EA 144 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	6 December 1968
Case Number:	916/1968 (174/68)
Before:	Trevelyan J
Sourced by:	LawAfrica

[1] Landlord and Tenant – Business premises – Sub-tenancy – Whether sub-tenancy protected where head tenancy was outside the Landlord and Tenant (*Shops, Hotels and Catering Establishments*) *Act* (*Cap.* 301) (*K.*).

[2] Statute – Interpretation – Manner of.

Editor's Summary

The plaintiff, the owner of a Nairobi building, leased business premises to a company for a term of seven years from July 1 1961 and the company later sub-let the premises to the defendant for a period of four years and six months less the last three days of the original term of seven years. In the ordinary course of events the original lease therefore expired on June 30, 1968, and the sub-lease three days earlier, but the defendant claimed the protection of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301). A tenancy for a period exceeding five years is not protected by the Act. The plaintiff contended that even if the defendant's tenancy was protected vis-à-vis the Company, no protection was afforded as against the plaintiff owner whose lease of seven years with the company was outside the Act.

Held –

(i) the sub-tenancy continued under the provisions of ss. 4 (1) and (5) of the Landlord and tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301) and the sub-tenant was protected;

(ii) the Act must be construed by reference to its own wording and not according to cases decided on statutes with dissimilar wording.

Suit dismissed.

No cases referred to in judgment

Judgment

Trevelyan J: The plaintiff company (which I shall call "the plaintiff") is the owner of a building in Nairobi. It leased parts of it to a company for a term of seven years from July 1, 1961, and the company

in its turn (and with the plaintiff's consent) sub-leased part of what was demised to it to the defendant for a term of four years and six months less the last three days thereof. Accordingly, by effluxion of time, the lease would have expired on June 30, 1968 and the sub-lease some three days earlier. But on November 1, 1965, there came into force, so far as Nairobi is concerned, the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301) (and which I will be referring to as "the Act") and the defendant claims its protection. This protection the plaintiff denies on the ground that though the defendant was or may have been protected vis-à-vis its landlord, i.e. the company, such protection could not extend beyond that. I shall be going into this but there are other things which I must first deal with and the first of them is to point out that though other parts of the building have been referred to, and I shall have to refer to some basement premises, I am only required to give a decision about a shop referred to as "shop number 1" which I shall be calling "the shop".

[The judge set out the preamble to the Act and sections 2, 4 and 5 and continued:]

The plaintiff gave, or purported to give, three notices under s. 4 (1) of the Act. Nothing turns on the first of them but there is an issue to be resolved about the other two. These are dated March 29 and May 29, 1968, but although these dates were mentioned at the hearing, as was June 27, both sides argued the case as though, when the notices were given, the sub-lease had (subject to the Act, if it applied) expired. I discussed the matter with leading counsel when I noticed what had occurred, and they asked me to give my judgment without calling for further legal argument. This I do. In fact my task becomes somewhat easier because certain aspects of the case need not now be gone into, or into in detail. And, with this rather long introduction completed, I will turn to the matters in difference.

The company gave the defendant no notice under the Act, or at all. But the plaintiff served the two notices to which I have particularly referred. They were of no effect for the purpose for which they were given, i.e. for the purpose of s. 4 (1) because at the time they were given the plaintiff was not the landlord within the subsection. It is true that s. 5 (2) envisages a landlord giving notice both to his tenant and to any subtenant, but the circumstances in which this can be done are absent from the facts before us. In any event no notice, so far as we know, was also served on the company.

Section 4 makes it clear that a landlord who wishes to put an end to a tenancy to which the Act relates, even if that tenancy be for a fixed period, must give the prescribed notice. Here, assuming that the defendant had such a tenancy as defined, as the notices were wrongly given and were consequently of no effect, s. 5 (1) over which so much time was spent in considering whether the plaintiff was or was not a landlord for its purpose needs but the little comment I have already made.

But what of the plaintiff's arguments concerning a tenancy within the Act being carved out of a lease which is not within the Act? In my view the protection is there. A number of cases on the English law relating to rent restriction legislation was put to me to the effect that if a headlease is not statutorily protected, a sub-lease cannot make it so for express statutory authority is needed to saddle a landlord with such protection. I have no reason to doubt the correctness of the authorities cited to me in so far as the said legislation is concerned, but I am dealing with one particular statute catering for different circumstances with dissimilar wording. The purpose of the Act is revealed in its preamble and, by definition, only short terms can attract the benefits which it can give. One cannot imagine, certainly one should not be called upon to imagine, that a Tribunal appointed under the Act could consider, say, a 99-year lease as appropriate. It is true that no limits are prescribed but I think that my point has validity nonetheless. It seems to me that in a case such as we have here, a landlord who allows his tenant to sub-lease ought not to be heard to complain because the legislature has superimposed terms upon that sub-lease which affect him. But, in any case, ss. 4 (1) and 5 (1) are clear enough; the sub-lease goes on. But let us consider s. 5 (1) in a little detail. The word "tenant" of itself, does not have to refer to a tenant within the Act because the word is only defined "in relation to a tenancy". The expression "landlord's tenancy" which would better have been expressed as "landlord's term" needs two comments, that the word "tenancy" as defined includes a tenancy for a period not exceeding five years created by an underlease, and that the expression is "landlord's tenancy" and does not, therefore, concern itself with what I will term the "tenant's tenancy" As to the former comment, as you cannot have an underlease which reserves no reversion, i.e. as an underlease must be carved out of a larger term, and as a mesne-landlord can grant a term for as long as five years he may, by definition, himself have a term exceeding that period and grant a tenancy within the definition in the Act i.e. a protected tenancy. As to the latter comment one must,

as I pointed out, bear in mind why the Act was passed. It was suggested that such a finding would in some way stretch the meanings of the words beyond those defined, but I do not think that this is so. I considered whether s. 5 (2) must affect my views, but s. 5 (1) clearly states that a sub-lease does not of itself come to an end when the lease out of which it is carved comes to an end – which may not commend itself to common lawyers but is what the Act says. Section 5 (2) simply recognises the statutory realities.

I trust that counsel do not think that I have not pondered upon all that they urged or that I have not consulted the authorities to which they referred me but, as defence counsel said, the court must, in the end, construe the Act so far as it affects this case as best it can without benefit of cases decided upon it for there are none. I have construed it and can only hope that I have construed it correctly.

Queen's Counsel conceded that if the tenancy of the shop was held to be protected by the Act that was an end of his case. I have found this to be so and that is as far as I have at this stage been asked to go. I will now hear counsel.

After hearing Counsel, judgment was given for the defendant with costs for two advocates.

For the plaintiff:
JA Mackie-Robertson, QC and *PJ Ransley*
Macdougall & Wollen, Nairobi

For the defendant:
DN Khanna and *Zool Nimji*
Shapley, Barret Marsh & Co, Nairobi

Francis v Boniface
[1969] 1 EA 146 (HCT)

Division:	High Court of Tanzania at Mwanza
Date of judgment:	31 July 1968
Case Number:	84/1967 (175/68)
Before:	Seaton J
Sourced by:	LawAfrica

[1] Customary Law – Marriage – Brideprice a part of marriage under customary law.

[2] Jurisdiction – Magistrate's Court – Marriage – Claim under customary law of marriage – Magistrates' Courts Act, s. 14 (*T.*).

[3] Jurisdiction – Want of – Effect on proceedings.

Editor's Summary

The appellant sued in a District Court for the refund of brideprice. No leave had been given for the institution of the suit in a District Court under s. 57 of the Magistrates Courts Act (Cap. 537). His suit was dismissed and he appealed.

Held –

(i) Brideprice is one of the incidents of marriage under customary law;

(ii) proceedings in respect of marriage under customary law must be brought in a primary court unless the Republic or the President is a party or unless leave is given by the High Court;

(iii) the proceedings were a nullity for want of jurisdiction. Appeal dismissed.

No cases referred to in judgment

Judgment

Seaton J: This is an appeal from a suit for a refund of Shs. 500/-brideprice alleged to have been paid by the plaintiff to the defendant

in respect of the marriage of the plaintiff's brother Tadeo to the defendant's daughter, Victoria. The suit was instituted in the District Court of Bukoba and heard by the Senior Resident Magistrate. After hearing the evidence of both parties, and the submissions of their respective advocates, judgment was given in favour of the defendant because the Magistrate found that no money was paid to the defendant as brideprice.

The appeal was brought to this Court against the judgment on the merits of the case but a preliminary point has been raised on the question of jurisdiction, which was not considered in the lower court. The law applicable to the suit is customary law which, under s. 14 of the Magistrates Courts Act, Cap. 537, is justiciable in the primary courts. Under s. 13 of the Civil Procedure Code, every suit shall be instituted in the court of the lowest grade competent to try it. Consequently, argues the learned advocate for the appellant, the suit should have been transferred by the District Court to the primary court under s. 42 of the Magistrates Courts Act.

In his commentary on s. 15 of the Indian Civil Procedure Code, which is similar to s. 13 of our Code, Mulla points out (1934, 10th Edn, pp. 98 – 100) that this section lays down a rule of procedure not of jurisdiction – it does not oust the jurisdiction of the courts of higher grades which they possess under the acts constituting them. Under s. 35 (2) of the Magistrates Courts Act, District Courts have limited original jurisdiction in proceedings save where jurisdiction is conferred by written law exclusively on some other court or courts. The wording of s. 14 of the Magistrates Courts Act does not appear to give primary courts exclusive jurisdiction over suits involving customary law, hence I would hold that the District Court had jurisdiction to try the present suit.

However by s. 57 of the Magistrates Courts Act, no civil proceedings in respect of marriage, guardianship or inheritance under customary law, or the incidents thereof, shall be commenced in any court other than a primary court unless the Republic or the President is a party or the High Court gives leave. Brideprice is one of the incidents of marriage under customary law. Neither the Republic or the President is a party to this suit and the leave of the High Court was not sought or given for commencement in the District Court. The proceedings were, therefore, ultra vires. The decision dismissing the claim is upheld although for other reasons than those given in the judgment of the trial court.

Appeal dismissed with costs.

For the appellant:
DN Parekh
DN Parekh, Mwanza

For the respondent:
CC Patel
CC Patel, Mwanza

Tanganyika Shell Ltd v Khan
[1969] 1 EA 148 (CAE)

Division:	Court of Appeal for East Africa at Dar-Es-Salaam
Date of judgment:	29 November 1968
Case Number:	40/1968 (187/68)
Before:	Sir Clement de Lestang Ag P, Duffus Ag V-P and Spry JA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanzania – (Biron, J.)

[1] Rent Restriction – Standard rent – Assessment – Based on cost of construction – s. 4 (1) (*c*) *and* 4 (2*A*) (*b*) *Rent Restriction Act* (*Cap.* 479) (*T.*).

Editor's Summary

The respondent, as the owner of a property in Mbeya, had applied to the Rent Tribunal for a determination of the standard rent of his house and as a result of this application, the standard rent was assessed as Shs. 850/- per month. The respondent appealed against this assessment to the High Court and the learned judge set aside the Tribunal's assessment and substituted therefor a rent of 14 per cent of the market cost of the construction which he estimated at Shs. 120,000/-. The present appellant, as tenant, appealed on the ground that the judge erred in assuming that a valuation made in 1966 or 1967 should be relied on as an indication of the market cost of construction in 1960 and that, as the Tribunal was exercising a discretion in assessing the standard rent, their determination should not lightly have been interfered with. Section 4 (1) (*c*) in addition to stating that the standard rent should not exceed a total of an amount equal to 14 per cent of the market cost of erection, included also an additional amount based on ground rent, rates etc.

Held –

(i) There was no evidence on record as to whether property values rose or fell in Mbeya between 1960 and 1967 and the current value was therefore not relevant in assessing the statutory maximum;

(ii) the learned judge had erred in starting with the maximum statutory rent and then considering whether there was any reason to fix a lower figure;

(iii) provided that the rent assessed was not in excess of the statutory maximum, or otherwise manifestly wrong, the judge was not entitled to interfere with the Tribunal's decision;

(iv) the amount of Shs. 61/65 should be added to the figure determined by the Tribunal to cover the additional allowance within the section in respect of ground rent and rates.

Appeal allowed with costs. No order as to costs in High Court.

Cases referred to in judgment:

(1) *Siraj Din v. Ali Mohamed Khan*, [1957] E.A. 25.

November 29, 1968. The following considered judgments were read:

Judgment

Spry JA: This is an appeal from the judgment and decree of the High Court of Tanzania on an appeal from the determination by the Rent Tribunal of Mbeya of the standard rent for a dwelling house in Mbeya.

The house was built during 1960, and therefore, under s. 4 (1) (*c*) of the Rent Restriction Act (Cap. 479), the rent should not exceed fourteen per cent of the "market cost of such erection . . . at the date of completing such erection", plus ground rent and rates. It is not disputed that the Act applies to Mbeya.

In his application to the Tribunal, the respondent, who was owner of the house, declared the market cost of erection to have been £7,500 "approximately". He said the house was first let at a rent of Shs. 850/- per month and that at the date of the application it was let at Shs. 600/- per month. At the hearing, the respondent said he was unable to furnish any evidence in support of his estimate of the cost of construction. He sought to support it by a valuation of Shs. 137,857/40 said to be "in accordance with the estimates of the Town Council", whatever that means; by a valuation as at August 6, 1967, by the inspector of building; and by a comparison with another house which cost £8,000, but at what date we do not know. He appears to have called no evidence, nor did the appellant company. The Tribunal inspected the house, estimated its value at £6,000 and assessed the standard rent at Shs. 850/- per month.

On appeal from this determination, the learned judge observed that it was difficult, if not impossible, to know what had transpired before the Tribunal or to follow the reasoning of the Tribunal. Faced with this difficulty, he attempted to make his own assessment. He said:

> "Although, as very rightly contended by Mr. Peera for the respondent, the valuation by the Tribunal of Shs. 120,000/- is not necessarily the market cost of erection, there is no evidence to suggest or any reason to suppose that such valuation is any different from the market cost of construction, which figure, as noted, Mr. Singh for the appellant is prepared to accept, and which, in the absence of any other figure, should I consider, be adopted, as I so do. Although the figure of 14% of the market cost of construction is the maximum, it is the general, if not the universal, figure adopted by rent boards now tribunals, and there is no reason at all why it should not be."

He proceeded to award a rent based on fourteen per centum of Shs. 120,000/-.

Before proceeding to the arguments, it may be well to set out the relevant provision of the Act which provides *inter alia* as follows:

> "4(1) The expression 'standard rent in relation to any premises means –
>
> . . .
>
> (*c*) where the premises were . . . erected . . . and let after the prescribed date, an annual rent to be assessed by the Tribunal which shall not exceed the total of an amount equal to fourteen per centum of the market cost of such erection . . . at the date of completing such erection . . . and [an amount based on ground rent, rates, etc.]."

This should be read with para. (*b*) of sub-s. (2a) of the section, which reads:

> "(*b*) for the avoidance of doubts, it is hereby declared that the decision of the Tribunal as to the market cost of erection . . . in any case under the said paragraph (*c*) shall be a decision of fact and for the purpose of arriving at such decision the Tribunal may, if it thinks fit, deem the actual costs of such erection . . . to be the market cost thereof."

Mr. Riegels criticized the decision mainly on two grounds: first, he argued that the learned judge had erred in assuming that a valuation made in 1966 or 1967 could be relied on, in the absence of other evidence, as an indication of the market cost of construction in 1960; secondly, he argued that the Tribunal had been exercising a discretion and therefore that their determination should not lightly be interfered with.

As regards the first point, I find Mr. Riegels' argument irresistible. There is no evidence on the record, indeed not even an expression of opinion, as to whether property values rose or fell in Mbeya between 1960 and 1967. Property values

are constantly changing and the change over six or seven years may be considerable, particularly where, as in the present case, they were years of great political, social and economic change. I think the current value may have had some relevance when the Tribunal was considering the appropriate rent, but that it was not relevant in assessing the statutory maximum.

In this connection, I would remark that the Act does not say that the standard rent is to be based on the cost of construction; indeed it is silent as to the basis of assessment. What it does do, is to impose a maximum, which is based, not on the actual cost of construction, but on what is termed the market cost of construction. This clearly means what the building ought to have cost at the relevant date and was obviously introduced to prevent a landlord claiming rent on the basis of actual cost, where the cost was inflated, possibly for some collateral advantage.

As regards Mr. Riegels' second ground, he began by submitting that the learned judge had erred in saying, or at least implying, that the maximum should be the normal. This, in Mr. Riegels' submission, amounts virtually to taking away a discretion which the legislature has conferred on these tribunals. Here, again, I think there is merit in the argument. It may well be that in Tanganyika generally an unrestricted economic rent would normally exceed the standard rent – the learned judge is very experienced in these matters – but it does not follow that that is true everywhere, and it cannot alter the fact that the correct approach for a tribunal is first to decide what it thinks should be the proper economic rent and then to satisfy itself that that rent does not exceed the statutory maximum. With great respect, I think it is wrong to start with the maximum and then consider whether there is any reason to fix a lower figure.

Mr. Riegels submitted that a tribunal is not under any duty to give its reasons and that it should be assumed, unless there is any indication to the contrary, that it has taken all relevant matters into account. For these propositions, he relied (*inter alia*) on *Siraj Din v. Ali Mohamed Khan*, [1957] E.A. 25, a decision of this Court on appeal from the High Court of Kenya in a rent restriction case, in which Bacon, J.A., set out certain general principles, of which the first was that

> "there is no legal obligation on the board to record its reasons for any of its decisions"

although he went on to say that it may well be desirable for it to do so. I think that applies equally to a tribunal established under the Act.

Mr. Riegels went on to argue that if the Tribunal was not required to give its reasons and provided the rent it assessed was not in excess of the statutory maximum, the first appellate court was not entitled to interfere unless it could be shown that the Tribunal had not exercised its discretion judicially or that there had been some breach of natural justice.

I would observe here that the right of appeal conferred by the Act is a limited one. Section 11 (1) reads as follows:

> "11(1) Except as hereinafter provided, where any question is, under the provisions of this Act, to be decided or determined by the Tribunal, the decision or determination by such the Tribunal shall be final and conclusive:
>
> Provided that an appeal from any order, decision or determination of the Tribunal shall lie to the High Court upon any point of law or of mixed fact and law."

At the hearing in the High Court, no arguments were advanced for the landlord, then the appellant and now the respondent, other than that the Tribunal

had given no reasons for its decision and that a fair rent would be fourteen per cent of Shs. 120,000/-, the Tribunal's own valuation. The first of these grounds fails, in my view, on the authority of the *Siraj Din* case. The second appears to me to be a question of fact, unless it implies that the Tribunal was under a duty to adopt a fixed percentage of the cost or value, in which case it is, in my opinion, clearly wrong. It cannot be said that the rent assessed is, on the face of the record, manifestly wrong, since it is the same as the rent contractually agreed at the time of the first letting, when rents in Mbeya were apparently uncontrolled.

I can see nothing on the record to show that the Tribunal misdirected itself, or that its determination was contrary to law or unjust in any way. It is not suggested that the determination was in excess of the statutory maximum. In these circumstances, I do not consider that the learned judge was entitled to interfere, and to substitute his own opinion of what should be the proper rent.

There are two minor points. The standard rent is made up of two elements: one is truly rent, the other a repayment to the landlord of ground rent and rates. The Tribunal made no reference to this second element but Mr. Riegels conceded that if the appeal were allowed, this second element should be added to the figure determined by the Tribunal; the amount is agreed at Shs. 61/65 per month. Also, it was agreed at the hearing of the appeal to the High Court that the standard rent should run from June 1, 1966, not October 1, 1966, as determined by the tribunal.

I would allow this appeal, with costs, set aside the judgment and decree of the High Court and restore the determination of the Tribunal with this modification only, that there is to be added to the figure of Shs. 850/- the amount of Shs. 61/65, representing ground rent and rates, and the standard rent is to apply as from June 1, 1966. In the event, the respondent's appeal to the High Court succeeded to the very limited extent of the addition to the standard rent of the element in respect of ground rent and rates and the change of the date of commencement of the standard rent, though not to the date he sought. I would therefore make no order as to costs in the High Court.

Duffus Ag V-P: I have had the advantage of reading the judgment of Spry, J. A., which fully sets out the law and facts on this matter.

This was an application by the landlord/respondent to fix the standard rent of premises in Mbeya. It is agreed that s. 4 (1) (*c*) of the Rent Restriction Act, 1962 (Cap. 479) applies in this case. The relevant portion of this section states:

> "(*c*) where the premises were . . . erected . . . and let after the prescribed date, an annual rent to be assessed by the Tribunal which shall not exceed the total of an amount equal to fourteen per centum of the market cost of such erection . . . at the date of completing such erection . . ."

and then the section also provides for the addition of an amount in respect of the ground rent and rates payable.

The Tribunal fixed the standard rent at Shs. 850/- per month but gave no reasons for doing so. The notes of the proceedings before the Tribunal, however, does show that the Tribunal appears to have fully considered and dealt with this matter.

On the appeal to the High Court the learned judge held that the valuation of £6,000 arrived at by the Tribunal should in the absence of any other figure be adopted as the market cost of construction, and accepting this figure he set aside the assessment by the Tribunal and fixed the standard rent per annum as being fourteen per cent of that figure. He did so apparently because:

(*a*) he was unable to follow the reasoning of the Tribunal in arriving at their assessment of the standard rent at Shs. 850/- per month; and

(*b*) here I quote from the judgment "Although the figure of 14% of the market cost of construction is the maximum, it is the general, if not the universal, figure adopted by rent boards now tribunals, and there is no reason at all why it should not be."

The learned judge then fixed the standard rent on the basis of fourteen per cent of £6,000, and he added ground rent and rates.

With great respect I find no justification for this order, it is in effect taking away the discretion of the Tribunal to assess the standard rent as given by s. 4 (1) (*c*) of the Act and instead substituting a fixed rental of fourteen per cent of the market cost of construction instead of the fourteen per cent being, as the section states, the maximum rental that could be allowed.

I entirely agree with Spry, J.A., that there is nothing on the record to show that the Tribunal misdirected itself or that its determination was contrary to the law or unjust in any way. In these circumstances I can find no justification for the High Court's alteration of the Tribunal's assessment of the standard rent, except, and this is conceded, by adding the amounts payable for the ground rent and for rates and changing the effective date of commencement from October 1, 1966, to June 1, 1966.

In assessing the standard rent under s. 4 (1) (*c*) the Tribunal had to arrive at some figure as to the market cost of construction in order to ensure that its assessment did not exceed fourteen per cent of such cost. In this case it is clear that the maximum figure for such cost would not exceed £7,500 which is the figure put down by the landlord in his application. No evidence was called to establish the market value of construction but this point was considered by the Tribunal when they estimated the value at £6,000. The tenant/appellant has not suggested that the assessment was in excess of the fourteen per cent and I think it is clear, and certainly it is not in dispute, that the standard rent as assessed by the Tribunal would not be in excess of the fourteen per cent.

I agree with Spry, J.A., that this appeal be allowed on the terms and conditions set out in his judgment.

Sir Clement De Lestang Ag P: concurred.

For the appellants:
MD Reigels with *IG Peera*
Donaldson & Wood, Dar-es-Salaam

For the respondent:
Ranbir Singh
Awatar Singh & Co, Dar-es-Salaam

Hunts Travel Services Ltd v Okoti and another
[1969] 1 EA 153 (CAK)

Division: Court of Appeal at Kampala

Date of judgment: 29 November 1968

Case Number: 34/1968 (3/69)

Before: Duffus JA, Spry JA and Law JA

Sourced by: LawAfrica

Appeal from: High Court of Uganda at Kampala – Mead, J

[1] Civil Practice and Procedure – Pleading – Whether findings covered by the pleadings. Negligence – Contributory negligence – Collisions at sea – Whether principles applicable to collisions on land.

[2] Negligence – Two collisions – Whether separate from one another.

Editor's Summary

The High Court of Uganda held the appellant and the first respondent respectively seventy-five per cent and twenty-five per cent to blame for an accident in which the second respondent's husband was killed. The first respondent's Volkswagen had struck the appellant's mini-bus a glancing blow (for which the first respondent was solely to blame) which forced both vehicles off the road. One hundred and fifty yards further on the vehicles collided again when both were driving back on to the road. The judge apportioned the blame in respect of the second collision and the appellant appealed alleging firstly that anything done by the appellant's driver after the first collision was done in the agony of the moment, and secondly that the judge made findings of negligence which had not been pleaded and thirdly that the judge relied unduly on cases arising out of collisions at sea.

Held –

(i) the judge was justified in considering the second collision as separate from the first impact;

(ii) the allegations in the pleadings sufficiently covered the findings (*Plotti's* case (3) applied);

(iii) the principles enunciated in *Admiralty Commissioners v. SS. Volute*, [1922] 1 A.C. 129 are of the highest persuasive authority relating to negligence and contributory negligence and are applicable to collisions on land as well as at sea;

(iv) the judge's findings were reasonable and supported by the evidence.

Appeal dismissed.

Cases referred to in judgment:

(1) *Admiralty Commissioners v. S.S. Volute*, [1922] 1 A.C. 129.

(2) *Swadling v. Cooper*, [1931] A.C. 1.

(3) *Plotti v. Acacia Co. Ltd.*, [1959] E.A. 248.

Judgment

The considered judgment of the court was read by **Law JA:** This is an appeal against the decision of the

High Court of Uganda holding the appellant to have been seventy-five per cent to blame for a road accident in which the husband of the second respondent, who was a passenger in one of the two vehicles which collided, was killed. The facts as found by the judge had not been challenged on appeal and are as follows.

The appellant's mini-bus was being driven by the appellant's employee on April 9, 1965, from Kampala to Paraa Lodge. At a spot about 122 miles from Kampala, where the murram road was wide and somewhat dusty, a Volkswagen driven by the first respondent overtook the mini-bus and in so doing struck

the mini-bus a glancing blow at the rear. The judge found the first respondent to have been wholly to blame for this impact, which had the effect of forcing the two vehicles respectively to the left and right hand sides of the road. The mini-bus continued on a fairly straight course along a shallow ditch, and the Volkswagen continued along the right hand side of the road, until they collided again near the centre of the road, about 150 yards from the point of original impact. It would appear from the tracks left by the vehicles that the mini-bus had driven back on to the middle of the road when it met the Volkswagen which was also making for the middle of the road. Both vehicles then overturned. The judge found that the driver of the mini-bus was seventy-five per cent to blame for this second collision, and the driver of the Volkswagen twenty-five per cent to blame. He also found that the second respondent's husbands' death was the result of the second collision, and that this second collision was not the natural result of the first impact between the vehicles for which the first respondent was solely to blame. He accordingly fixed the appellant's liability to pay such damages as may have to be paid as a result of the accident at seventy-five per cent, and the first respondent's liability at twenty-five per cent.

Mr. Phadke for the appellant made a number of submissions in his attack on these findings. Firstly, he submitted that anything done by the appellant's driver after the original impact was done in the agony of the moment, and he relied on *Swadling v. Cooper*, [1931] A.C. 1. In view of the distance covered by the vehicles after the original impact, we are of the view that the judge was justified in considering the second collision as something separate from the first impact, and in examining the driving of the parties to see whether they were guilty of negligence independently of and subsequently to the first impact, for which the first respondent was solely to blame. The judge found that the appellant's driver was partly to blame for the second collision, by reason of his failure to slow down or stop in the course of the 150 yards covered after the first impact, and for failing to have regard for the presence of the Volkswagen when getting back onto the road from the ditch. As to this, Mr. Phadke submitted that the judge should not have made, and decided the case upon, findings of negligence which had not been pleaded, and he relied on *Plotti v. Acacia Co. Ltd*., [1959] E.A. 248. The particulars of negligence pleaded against the appellant's driver included the following:

> "he allowed his said mini-bus to come into contact with the said Volkswagen car during the time that the latter was attempting to overtake . . ."

We consider that this allegation sufficiently covers the findings that the plaintiff's driver was negligent between the two impacts, but even if we are wrong we consider that this aspect of the case was in issue between the parties at the trial and was contemplated by them, so that the judge's findings do not offend against the decision in *Plotti's* case (above). Mr. Phadke also complained that the learned judge relied unduly on cases arising out of collisions at sea, such as *Admiralty Commissioners v. S.S. Volute*, [1922] 1 A.C. 129, but we are satisfied that the principles enunciated in that case, which is of the highest persuasive authority, relating to negligence and contributory negligence, are applicable to collisions on land as well as at sea, and have frequently been so applied. Finally Mr. Phadke submitted that the judge's assessment of responsibility for the accident was manifestly wrong and should be reversed especially having regard to his finding that the first respondent was entirely to blame for the first impact, without which the accident would never had occurred. As to this, this Court has frequently held that it will only interfere with a trial court's apportionment of responsibility, which is a matter of discretion, if satisfied that the apportionment was clearly wrong. We are not so satisfied in this case. On the contrary, we consider his findings to have been reasonable and supported by the evidence.

For these reasons we consider that this appeal fails, and we order that it be dismissed with costs to the respondents.

Appeal dismissed.

For the appellant:
PV Phadke
Parekhji & Co, Kampala

For the first respondent:
SH Dalal
Dalal and Singh, Kampala

For the second respondent:
CTS Belk
Hunter and Grieg, Kampala

Nakalema v Jamindar and others
[1969] 1 EA 155 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	20 December 1968
Case Number:	247/1967 (8/69)
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Damages – Personal injuries – Quantum – Shortening of leg.

Editor's Summary

The plaintiff was injured in a motor accident as a result of which she suffered a shortening of her leg by 1¼ inches.

Held – General damages of Shs. 35,000/- awarded to the plaintiff.

Cases referred to in judgment:

Edward J. K. Kitamirike v. E. Mutaguoya, [1965] E.A. 443.

Judgment

Sheridan J: The plaintiff's main injury was to her right femur, which was put on traction and immobilised for two months. This has resulted in a limp owing to 1¼ ins. shortening of the right leg. There will be some slight permanent disability.

She also sustained cerebral concussion, fractured pelvis and a fractured rib in the accident. There must have been considerable pain and suffering. She appears to have made a good recovery. It appears that she did not attend hospital as an out-patient for physio-therapy. For this reason I disallow her claim for Shs. 222/- for transport to hospital. She worked as a typist for Shs. 300/- p.m. It does not appear to be disputed that she was out of work for six months. I allow the other items of special damages.

On general damages, Mr. Dalal, for the plaintiff, referred me to *Edward J. K. Kitamirike v. E. Mutagubya*, [1965] E.A. 443, where SIR Udo Udoma, C.J. awarded the plaintiff, a professional man, who sustained similar injuries, including a 1 in. shortening of the leg, Shs. 50,000/-. In that case there was a prospect of osteo-arthritis and a further operation. Here, Sir John Croot's prognosis on the plaintiff is much more cheerful. There will be a loss of amenities, including dancing, unless she wears special shoes, which will be expensive. I award her Shs. 35,000/-. There will be judgment for the plaintiff against the first and third defendants for Shs. 37,210/- with interest and costs. They are each liable to pay half this amount.

Judgment for the plaintiff.

For the plaintiff:
SH Dalal
Dalal and Singh, Kampala

For the first and fourth defendants:
JP Wilkinson, QC, RE Hunt and *A Korde*

For the first defendant:
RE Hunt, Kampala

For the second and third defendants:
C Mboijana, Kampala

Mondo v Jessa
[1969] 1 EA 156 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	7 January 1968
Case Number:	218/1968 (9/69)
Before:	Sheridan Ag CJ
Sourced by:	LawAfrica

[1] Damages – Personal injuries – Quantum – Paralysis.

[2] Negligence – Collision – Pedestrian struck by motor vehicle.

Editor's Summary

The plaintiff was walking along the left hand side of the Natete-Mengo Road when he was hit in the back by a car owned by the defendant. The defendant alleged that the plaintiff stumbled on the edge of the tarmac. The plaintiff who was a painter suffered a fracture of the spine at the level of the eleventh thoracic lumbar vertebra and was completely paralysed in his legs and bladder, and would need constant help.

Held –

(i) the defendant's driver was negligent;

(ii) general damages of Shs. 300,000/- awarded to the plaintiff.

Judgment for the plaintiff.

Cases referred to in judgment:

(1) *Page v. Richards & Draper* (1920), 149 L.T. 263.

(2) *Tart v. Chitty & Co*., [1931] All E.R. Rep. 826.

(3) *Tidy v. Battman*, [1934] 1 K.B. 319.

(4) *Waldon v. War Office*, [1956] 1 All E.R. 108.

(5) *Kokilaben Purohit v. Devram Kanji and Another*, Uganda H.C.C.C. No. 6 of 1961 (unreported).

(6) *Mohamed Shadik Ausari v. Hashmat Ali Kadir*, Uganda H.C.C.C. No. 698 of 1962 (unreported).

(7) *Singh v. Toong Fong Omnibus Co. Ltd*., [1964] 3 All E.R. 925.

(8) *Fletcher v. Autocar and Transporters Ltd*., [1968] 1 All E.R. 726.

Judgment

Sheridan Ag CJ: The plaintiff claims damages for negligence. On March 10, 1968, he was walking along the Natete-Mengo Road in the direction of Mengo when he was hit in the back by a Peugeot Saloon Car, number USO. 588, owned by the defendant and driven by Amin Shamji, his son.

The plaintiff gave evidence that at about 9.30 a.m. on March 10, which was a Sunday, he was walking on the edge of the tarmac when he heard a car coming very fast. He turned round and saw a car at the top of the hill. Before he could carry out his intention of going on to the murram, which was muddy owing to rain, he was hit. The tarmac is broken. It is about two inches higher than the murram. The plaintiff denies that he slipped.

In his defence the defendant denies negligence, and contends that the collision was caused, or alternatively contributed to, by the negligence of the plaintiff.

Eseza Luwule, who lives on the opposite side of the road, states that at about 3 p.m. she was on her way to see a friend when she saw the plaintiff being hit by the car from behind as he was walking on the edge of the tarmac. She says that the car was coming at a high speed. If she was intending to cross the road she would naturally look to see if it was clear. At the time of the accident the car

swerved a bit to the right and carried the plaintiff. After hitting the plaintiff the driver reversed about three yards.

Corporal Katega got to the scene of the accident at about 4.30 p.m. He found the plaintiff lying by the side of the road, unable to move. Although Miss Luwule states that he was not moved before the police arrived, Katega states that he had been put there. Katega had him taken by ambulance to Mulago Hospital. The car was still there with its three Asian occupants. He noticed a pool of blood and tyre-marks made by braking on the road. He made a sketch plan. The road is 18 ft. 5 ins. wide at the spot where the pool of blood was. It was 4 ft. 2 ins. from the left side of the road facing Mengo. The car was twenty-eight feet behind the pool of blood. The front was 6 ft. 10 ins. and the back 6 ft. 4 ins. from the side of the road, indicating that the car was at a slight angle. Behind it there were straight tyre-marks 92 ft. 5 ins. long, commencing six feet from the side of the road.

Shamji is a student aged nineteen. He lives in Masaka. On January 9, 1968, he got a driving licence. At about 1.30 p.m. on March 10 he drove his father's car from Masaka to Kampala. In the car were his father, a friend and his two small sisters. It had been raining heavily. He had driven along this road twice before. He first saw the plaintiff from the top of the first of two hills leading to Mengo. He was two feet from the side of the road. Shamji went on

> "As I got near I saw that he was walking unsteadily. He started going into the road. I hooted and braked but by then he had almost fallen down when I hit him. He seemed to stumble – not as if to cross the road.
>
> I was on my left side – about a yard from the edge. When I saw him I tried to go to the right. He did the same. When I hit him the car stopped, I'm not sure where."

In cross-examination he admitted travelling at 35–40 m.p.h., although the township limit was 30 m.p.h. He was unable to check his speed as he was going downhill on a wet road. He was deterred from driving suddenly to the right to avoid the plaintiff as the car might have skidded, and there was the possibility of traffic approaching up the second hill.

In the statement which he wrote out for the police at 4.45 p.m. on the same day, he admits that this is a dangerous stretch of road because of the two hills. He describes his speed of around 45 m.p.h. as reasonable. He states "I was driving on my rightful side (left of the road) and suddenly a figure emerged from, what seemed to me, out of nowhere . . . Then, surprisingly enough, the person started moving away from the road (although he was still quite a way in) and so obviously I thought it was all fine and that the man had been unaware of my car at first, and then had seen it and was carefully moving to safety. I was still careful and tense. Then suddenly the man toppled down, and there it was! We later found that the man had been very drunk." In his final address Mr. Wilkinson, for the defence, conceded that there was no question of drunkenness. Mr. Kiryabwire's report dated December 11 confirmed this.

The defence theory is that the plaintiff must have stumbled on the uneven edge of the tarmac as he looked round to see the car, and it was then that it hit him. That would at least place him firmly on his correct side of the road.

Mr. J. W. M. Kiryabwire F.R.C.S., Senior Lecturer in Surgery, Makerere University Medical School, under whose care the plaintiff has been since the accident, states that his injuries, which I will deal with later, were caused by him being forced to bend as a result of a hit at the back. If the plaintiff had been turning or stumbling, I would not have expected such a direct hit.

In *Tart v. Chitty & Co*., [1931] All E.R. (Rep.) 826 at p. 829 Swift, J. referred to *Page v. Richards & Draper* (1920), 149 L.T. 263 where Rowlatt, J. said:

> "The plaintiff, who was walking along the road, knew nothing material to the case except that he was struck in the back by a motor car, and the driver of the motor car never saw the plaintiff until he struck him. That is all. On those facts the learned country court judge has found that there was no negligence on the part of the driver, but I do not think he can possibly have found that – of course, we are not reviewing him – that means, we are not re-trying the case – without making a mistake in point of law, or misdirecting himself, as it is sometimes called – misunderstanding the law and misapplying its principles. It seems to me that when a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound to go not faster than will permit of his stopping, or deflecting his course, at any time to avoid anything he sees, after he has seen it. If there is any difficulty in the way of his seeing, like a fog for instance, he must go slower in consequence. In a case like this, where a man is struck without the driver seeing him, the driver, the defendant, is in this dilemma: either he was not keeping a sufficient look-out, or, if he was keeping the best look-out possible then he was going too fast for the look-out that could be kept. I really do not see how it can be said that there was no negligence in running into the back of a man. If he had better lights or had kept a better look-out, the probability is that the accident would never have happened."

Although this decision was disapproved of in *Tidy v. Battman*, [1934] 1 K.B. 319 in so far as it laid down as a principle of law that a person is negligent if he is travelling at such a speed that he is not able to pull up within the limits of his vision, I think that on the analogous facts the plaintiff is entitled to succeed.

The only criticism that can be made of the plaintiff's evidence is that he is mistaken as to the time of the accident. This may be attributable to his injuries. It cannot affect the main issue.

Shamji, an inexperienced young driver, hit the plaintiff in the back as he was walking along the road on his correct side. Shamji drove too fast in unfavourable conditions along a dangerous stretch of road and, as he more or less admitted in his police statement, he was not keeping a proper look-out.

Clearly the plaintiff is entitled to substantial damages. He had been a refugee in Uganda, from the Congo since 1966. He is 32. His wife and seven children are still in the Congo. From 1955 to 1957 he was Chief Mechanic at Kamina Air Base, at Shs. 360/- p.m. From 1960 to 1964 he was Superintendent of Police, Stanleyville, earning Shs. 2,000/- p.m. In Uganda he has earned a living by painting, which brings him in Shs. 500/- to Shs. 600/- p.m.

Mr. Kiryabwire gave evidence that as a result of a fracture of the spine at the level of the eleventh thoracic lumbar vertebra, the plaintiff is completely paralysed in both lower limbs and in the bladder, which means that he is unable to control his urine. He is likely to get repeated urinary infections, fever and pain in the loins and kidneys. He has bedsores which will need an operation to heal. He will need a daily disposable urinary bag costing Shs. 8/50. He is confined to a wheel chair. He will need constant help, as an ideal a male nurse, which would cost Shs. 400/- to Shs. 500/- p.m. His ability to paint still exists, but it cannot be the same. What his future would have been if he had not been reduced to this serious permanent disability is anyone's guess. There is some diminution of expectation of life.

Mr. Dalal, for the plaintiff, referred me to *Kokilaben Purohit v. Devram Kanji and Another*, H.C.C.C. No. 6 of 1961 (unreported), where the victim was also a pedestrian struck by a car from behind. He was an Asian schoolteacher, aged thirty-seven. He earned Shs. 6,900/- p.a., rising to a maximum of Shs. 14,640/- p.a.

He sustained a compound fracture of the skull, resulting in impairment of his mental condition, a fracture of the right leg and a large wound in the nasal region. He had been rendered incapable of doing any work involving any intellectual process. Here the plaintiff's brain is lucid. Under the heads of loss of amenities of life and pain and suffering, Sir Audley McKisack, C.J., awarded him Shs. 140,000/-. For loss of prospective earnings over a period of eighteen years he awarded Shs. 160,000/-. Here I have no safe guide under the latter head. Allowing for a diminition of earnings of Shs. 200/- p.m. and an expectation of life of twenty years that would be Shs. 48,000/-. For the required help, including the disposable bag or some suitable and possibly cheaper alternative, I would allow Shs. 300/- p.m., which would amount to Shs. 72,000/-, making a total of Shs. 120,000/-. Some scaling down must be done to allow for the hazards of life and for the fact that the plaintiff will receive an immediate gross sum instead of a monthly sum over a period. I think that the proper figure to award under this head would be Shs. 90,000/-.

Under the first head I was referred to *Mohamed Shadik Ansari v. Hashmat Ali Kadir*, H.C.C.C. No. 698 of 1962 (unreported), where Jones, J., awarded Shs. 250,000/- to an Asian carpenter aged thirty-six who had suffered a fracture of the first lumbar vertebra, with injury to the spinal cord and nerves, with initial total paralysis of the lower limbs, bladder and rectum. Full power of sensation had returned to the lower limbs and the victim was able to walk, but he had been rendered sexually impotent, and this seems to have influenced the learned judge most in making his award. Here there is no evidence that the plaintiff's sexual powers have been affected but, on the other hand, he will never be able to walk.

No sum of money can fully compensate the plaintiff for the severe injuries which he received, but he is entitled to fair compensation in a single comprehensive sum. Duplication of damages for loss of future earnings and loss of amenities of life is to be avoided: see *Fletcher v. Autocar & Transporters Ltd*., [1968] 1 All E.R. 726. There, a quantity surveyor aged fifty-six, who was earning £3,000 to £4,000 p.a. net after tax, received severe brain injuries and he was awarded over £50,000. Here the plaintiff is in much humbler circumstances in life, and I must emphasise that his brain remains unaffected. Regard must also be had to local conditions and to awards in comparable cases: *Singh* (*an infant*) *v. Toong Fong Omnibus Co. Ltd*., [1964] 3 All E.R. 925. In *Waldon v. The War Office*, [1956] 1 All E.R. 108, where the plaintiff aged twenty-eight, an engineer earning £9 – 15 a week, with good prospects, received similar injuries, the Court of Appeal increased an award of £12,875 to £17,000.

In this case I think that fair total compensation would be Shs. 300,000/-. There will be judgment for the plaintiff for that sum with interest and costs.

Judgment for the plaintiff.

For the plaintiff.
SH Dalal
Dalal and Singh, Kampala

For the defendant:
PJ Wilkinson, QC and *MA Patel*
Patel and Shah, Kampala

Kinyanjui v South India Insurance Co Ltd

[1969] 1 EA 160 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	5 February 1968
Case Number:	156/1967 (18/69)
Before:	Trevelyan J
Sourced by:	LawAfrica

[1] Insurance – Motor Insurance – Whether vehicle "owned and operated" by insured.

[2] Insurance – Motor Insurance – Lapse of policy on transfer of ownership.

[3] Insurance – Motor insurance – Lapse of policy – Effect of Insurance (*Motor Vehicles Third Party Risks*) *Act* (*Cap.* 405) (*K.*).

[4] Insurance – Motor insurance – Authorised driver – Whether authorised by former owner – Insurance (*Motor Vehicles Third Party Risks*) *Act, ss.* 4, 5, 8, 10 *and* 16 (*K.*).

Editor's Summary

The plaintiff obtained judgment under the Fatal Accidents Act (Cap. 9) against the driver and the alleged owner of an omnibus. Upon claim being made upon it, the defendant insurance company disclaimed liability on the ground that the only policy of insurance had been taken out by the alleged owner whereas the bus had been transferred to and was being operated by a limited company. It contended further that the bus was not being used for the alleged owner's business, nor was it being driven either by him or by his authorised driver, nor did the alleged owner have any insurable interest in it.

Held –

(i) the limited company owned and operated the bus and employed its driver at the time of the accident;

(ii) on the transfer of the bus to the Company the policy lapsed;

(iii) the driver was not driving the bus with the permission of its former owner (*Peter's* case (1) adopted);

(iv) as there was no policy of insurance in force at the time of the accident, section 10 of the Insurance (Motor Vehicles Third Party Risks) Act (Cap. 405) can give no rights against the defendant (*Cross's* case (2) distinguished).

Case dismissed.

Cases referred to in judgment:

(1) *Peters v. General Accident and Life Assurance Co.*, [1937] 4 All E.R. 628 and [1938] 2 All E.R. 267.

(2) *New Great Insurance Co. of India v. Cross and Another*, [1966] E.A. 90.

Judgment

Trevelyan J: On February 19, 1962, an omnibus, registration number KGR 238 (which I shall call "the vehicle") was reversed by its driver Kirobi Nganga (whom I shall refer to as "the driver") and it came into contact with a man called John Mukono who died as a result of it doing so. On February 7, 1964, Karugi Kinyanjui (who was appointed under s. 6 of the Fatal Accidents Act (Cap. 9)) filed a suit in respect of the accident and death against two men, Boniface B. Kihanya (whom I shall call Mr. Kihanya) and the driver, said in the plaint to be the owner and driver of the vehicle respectively. These descriptions were not admitted as such, but there were admissions that Mr. Kihanya was "a bus owner and operator". On November 30, 1964, a consent judgment for Shs. 130,000/- interest and costs was entered against the two defendants jointly and severally in favour of the plaintiff and it was embodied in a decree on April 5, 1965.

The foregoing assertion of ownership was not, however, the one which was originally made for the letter before action dated August 31, 1962, sent to an insurance company, the defendant in this case (which company I shall be calling "the defendant") referred to "Leyland Bus KGR 238 which is owned by your insured Kiambu Bus and Transport Company Ltd." (I shall designate this concern "the company"). On receipt of this letter the defendant promptly disclaimed liability on the ground that it recognised no one but Mr. Kihanya as its insured. It said that it assumed that the vehicle had been sold to the company so that there was, to say the least, a breach of contract releasing it from any payment that it might otherwise have had to make. The advocates, quite undaunted, replied that they would sue Mr. Kihanya because he owned the vehicle. But this of itself could not have given rise to legal liability. Then on July 15, 1963, they wrote to Mr. Kihanya holding him liable and informing him that at the time concerned the vehicle "was registered jointly in your name and that of United Dominions Corporation Ltd." and "was at the time driven by your driver Kirobi Nganga". (I shall call this corporation "the hire-purchase company"). The defendant remained aloof. It pointed out that "the third party claims arising out of the accident are not covered by the policy" and said that it believed that the vehicle "may have been insured in the name of your client" but "at the material time it was definitely not used for his business. Nor did he have insurable interest in the vehicle. Kiambu Bus and Transport Co., Ltd., was the owner of the vehicle to all intents and purposes at the material time". It also claimed that the vehicle was not, at the relevant time, being driven by Mr. Kihanya or his authorised driver.

Faced with this uncompromising defensive stand the plaintiff resolved to invoke the provisions of the Insurance (Motor Vehicles Third Party Risks) Act (Cap. 405) (which I shall be referring to as "the Act") and the instant proceedings are the result. The defendant's attitude surprises me. It is as open to insurance companies as to anyone else to disclaim liability on any available legal grounds but some such companies are not, in proper cases, over-sensitive about it. In the circumstances of the present case there are three reasons why a disclaimer was not to be expected – (1) the premium was paid; (2) assuming that the vehicle was not being run for Mr. Kihanya's business, the facts made it very clear that it was doing the same sort of work for a company which had taken it over, a company of which the insured was both a shareholder and secretary; and (3) it cannot be said that the defendant may not have misled its insured. On the back of the proposal form liability to third parties is said to cover "The Insured or any person driving the insured Vehicle on the Insured's order or with his permission", without a word about anyone's business or employment. Yet the policy was restricted to "(*a*) The Insured (*b*) Any person provided he is in the Insured's employ and is driving on his order or with his permission" and only if the vehicle were being used in connection with the insured's business.

It was necessary to sift through a mass of documentary and oral evidence. Only Mr. Kihanya and the driver on the one hand and members of the defendant's staff on the other could be said to have had any reason to be partisan if they so wished. And what witnesses told us in this Court must, of necessity, be weighed with their prior acts, utterances and writings. I think that the central question for answering is who employed the driver at the time of the accident. Mr. Kihanya (who claims that he was the vehicle's owner and the driver's employer and who told us that "At the time of the accident concerned Kirobi Nganga was engaged as the driver of the bus") is the main contender on the one side while Mr. Ngoima (whom I shall refer to as such and who at one time or another was Chairman and Managing director of the company) and who claims

that the vehicle belonged to the company at the relevant time and that it and not Mr. Kihanya employed the driver is the main contender on the other side.

In the early part of 1961 Kiambu owners and operators of omnibuses decided to get together to form a company for their common good, advancement and protection. Mr. Kihanya told us "At this meeting a decision was taken that bus operators would combine . . . five people were appointed to take steps to form the company . . .". The vehicles were to become the company's property and the company would run them. The company was formed. Various vehicles were taken over and the company operated them as part of its fleet. The company's founders may not, perhaps, have had enough experience for the work in hand, but one thing was appreciated or learned, that vehicles on hire from hire purchase companies pose problems. Mr. Kihanya says that such vehicles were not to be brought into the company until they were free from hire purchase adding that he and his partners "agreed to transfer the ownership in the bus to the company after paying the hire purchase". But none of these gentlemen was called to confirm this assertion, an assertion which the documentary evidence signally fails to support. On April 17, 1961, a few days after the company was incorporated, Mr. Ngoima wrote a letter to the hire purchase company concerning eight vehicles of which the vehicle was one that "These vehicles were previously owned individually or with few members but the owners with the rest of the vehicles which had completed paying Hire Purchase numbering more than twelve decided and agreed to have all these vehicles amalgamated under the above name and as per certificate No. 4972 from the Registrar of Companies of 12.4.61". The letter went on to say that "We very well know that some vehicles are due for the hire purchase and, we very humbly ask you to excuse for the non-payment for a short time when we promise to pay within a short time . . .". This letter was written in the name of the company by Mr. Ngoima as its chairman. At that time the accident was a long way off. Seven days later Mr. Kihanya wrote to the Transport Licensing Board that "We the undersigned have agreed to transfer or surrender our T.L.B.'s to Kiambu Bus and Transport Co. Ltd., and we confirm that we will not apply for the new T.L.B.'s within a period of five years". The fifth vehicle on the list is the vehicle. Against it is Mr. Kihanya's signature as the person authorising the letter in relation to it. Subscribed is a confirmation that the "buses have been accepted".

I think that Mr. Ngoima signed that confirmation. Certainly did Mr. Kihanya do so as the company's secretary. I have no doubt that the company had taken the vehicle over, was rightly treating it as its own and was running it as part of the fleet which it owned from the time when it was formed, paying off the instalments due to the hire purchase company on it. In relation to Mr. Kihanya's letter to which I have just referred, why did he otherwise "agree to transfer or surrender" his licence to the company? And, as secretary, did he not show that the company had "accepted" it and the other vehicles to which it refers? Why the five years period was put in does not matter to us. What does matter is Mr. Kihanya's knowledge, conduct and writings on the day of that letter written almost seven years ago vis-a-vis the contrary contentions put forward in this Court.

On September 1, 1961, the hire purchase company wrote to the company about the arrears of hiring on the vehicle. Mr. Kihanya endorsed it in red "Cheque no – issued today 14.9.61" and he signed it. There is also a pencilled note "H.C. 01037 of 14.9.61" referring to the cheque. And there are other letters from the hire purchase company to the company – not to Mr. Kihanya – about arrears of charges on the vehicle. Whoever gave the information to the hire purchase company, Mr. Kihanya could not have been unaware of the position. The letter of February 8, 1963, concerning the balance due on the hiring and the option fee was written by the hire purchase company to the company and

copied to Githunguri Bus Service and to someone else. To this letter, Mr. Kihanya as the company's secretary replied "As desired by you we are confirming that we are sending our cheque for the settlement". "We" not "I".

The suggestion that the vehicle was operated for the benefit of Mr. Kihanya and his partners up to and perhaps beyond the time of the accident is not acceptable. It is as unacceptable as Mr. Kihanya's theme that the company was helping him. Nothing has emerged to show why it should have done so. Nor has it been shown that it in fact did so. By March 1961, the vehicle was shown in the company's cash book. There was, it will be recalled, evidence that even before the company was formed, its founders were running the business in anticipation of its incorporation. The "List of Buses now with the company" signed by Mr. Kihanya on April 22, 1961, includes the vehicle. As early as May 12, 1961, tickets for its passengers' fares were being issued by the company. The bill of July 8, 1961, debits the company with the amount thereof. And by the letter dated September 7, 1961, written but not signed by Mr. Kihanya the company is asking Mr. Kinuthia for money for using it.

On January 26, 1962, the hire purchase company wrote to the company – not to Mr. Kihanya – asking for the names of the insurers of two vehicles, one being the vehicle, and there is a draft reply in green and blue subscribed by the "Secretary" giving for the vehicle "Policy no. 24909 commencing 31.12.61 to 30.12.62" with the defendant. Whence that number stems we do not know and it is probably wrong. But the dates are right. Mr. Kihanya wrote that letter.

In the minutes of the meeting of April 1, 1962, appears a reference to Shs 5,383/69 having been collected on the vehicle in January and February 1962. "In addition there is a claim for Shs. 1,702/80 which Mr. Joseph Kamau claims to have paid as salaries. According to what the Chairman shows the right salaries would have been Shs. 746/29". That points to the company's liability for such payment. There is also minute numbered 106/62 which is headed "Outstanding Debts" under which the first entry is "Hire Purchase Account" and the further entry "N.B. It was agreed that Mr. Patrick Muchoki stop at once from the management of the company's buses".

There are, indeed, so many notes, letters and cheques showing that the company was operating the vehicle. In exhibit AB dated 21.6.1962 we have "These four vehicles have done very good but only No. 4 above had surrendered the cash to the office . . . The rest did not obey the company's orders . . ." No. 4 is the vehicle. A receiver was appointed for the company. In his Abstract of Receipts and Payments of February 6, 1963, there are entries of a payment to the hire purchase company of Shs. 1,000/00 for "o/a instalments K.G.R. 238 and K.G.Q. 637" and "To D. C. Kiambu o/a Road Licences K.G.R. 238, K.G.Q. 768, K.G.Q. 637 . . . 1392/00". And so on. It might not have been without significance that in the claim form of July 24, 1963, Mr. Kihanya said "Yes" to the question "Was it being used with your knowledge and consent?" but that he did not answer the question "Is he your permanent paid driver?" He did not, however, prepare the form and we do not know why no answer was given so I do not use the point against him.

It is unrealistic to suggest that the vehicle's driver, whoever he at any time might have been, should be Mr. Kihanya's employee when the vehicle was being operated on the company's behalf. The probabilities must be against it. Mr. Kihanya's evidence had a hollow ring about it and is generally unacceptable when tested as the law demands. But the Muster Roll as produced to the court does not contain the driver's name, and this may therefore be claimed to argue in favour of the plaintiff. The exhibit is not, however, a satisfactory document and it is very likely incomplete. Viewed with the evidence as a whole it does not matter if it is or it is not for the probabilities are against the plaintiff.

Moreover,

if we have no document showing the driver as in the company's employment there is none to show that Mr. Kihanya employed him either. It must not be forgotten where the burden of proof lies. And though the driver's name is not in the Roll, the vehicle is in it, shown as being run for the company or its founders as early as March 1961. Why should Mr. Kihanya have paid its driver? There are, in any case, pointers to the company being the driver's employer, certainly at the time of the accident – and before it – even apart from the evidence of Mr. Ngoima and the inferences generally to be drawn. There are, for instance, the books showing advances made to the company's staff, the driver's name appearing in three of them, exhibits X, Y and AD, the first showing those made in December 1961 and the third showing the same for the month when the accident occurred. And he is described in these books as the driver of the vehicle. I mentioned earlier that Mr. Kihanya said that at the time of the accident the driver was "engaged as the driver of the bus". It must be that it was the company who so engaged him at all material times. Mr. Kihanya I found, I regret to say, rather glib. I cannot, for instance, accept that an insurance company's representative wanted to "give me money so that I may settle the case myself . . . Give the money to me not to other people so that I might settle the case myself. They did not tell me how much."

I also found the driver to be glib. He claims to have been employed not by the company but personally by Mr. Kihanya. The vehicle had its own run. "On that day" the driver told us "I was working for Boniface. He authorised me to drive that bus that day". Then he said "That morning I was not told about driving the bus". He also claims, as I have said, to have been employed personally by Mr. Kihanya. But he agrees that the company was already functioning at the time when he was employed. As he says that he was working on the vehicle for more than a year it is at least for comment that the accident occurred a little less than a year after the company was formed. For further mentioning is the following question and answer, namely "(Q.) Karanja had been the conductor on the bus for eight months before the accident? (A.) I cannot deny because he may have acted on that bus before I was engaged." The evidence which he gave about the name on the vehicle is also worth referring to. He can read. He was asked about the name and said that it was "Boniface". No one else says so and the probabilities are against it. But in any event the evidence which he gave about it was vague, contradictory and unsatisfactory. He did not know whether to say that he saw the name or was told what it was. He was an unsatisfactory witness. Mr. Muchoki who worked on the vehicle fails to support Mr. Kihanya and the driver. He says, and I believe it to be so, that the company's name was on the vehicle and that on occasion he paid those who worked on it from fares which he collected. "Sometimes I paid the driver" he told us. He gave the balances to the company.

The facts of the vehicle remaining in the names of Mr. Kihanya and the hire purchase company and the omission of the driver's name from the Muster Roll are the strongest points in favour of the plaintiff but there is so much more that favours the defendant. And I might just add that nowhere in the minutes of the Company is there one word that vehicles were not for taking over until paid for.

It is my view, and I so find, that the company owned and operated the vehicle and employed the driver at the time of the accident. The legal results which flow from this finding depend upon the construction of the Act and a consideration of some legal authorities including *New Great Insurance Co. of India v. Cross and Another*, [1966] E.A. 90. If I do not oversimplify, the central question for decision in that case was the legal effect of a proviso that a person who otherwise would be an authorised driver under a policy of insurance was not so designated if he happen to be disqualified from driving a motor vehicle.

The Schedule to the policy in question stated:

"Authorised Driver: Any of the following:

The Insured.

Any person driving on the Insured's order or with his permission.

Provided that the person driving . . . is not disqualified . . . from driving the Motor Vehicle."

In the result, and by a majority, the court resolved that the proviso was a condition of the kind rendered inoperative by s. 8 of the Act.

As the policy in the instant case is not in similar terms I will set out parts of it:

"*LIABILITY TO THIRD PARTIES*

1. The Company will subject to the Limits of Liability indemnify the Insured in the event of accident caused by or arising out of the use of the Motor Vehicle or in connection with the loading or unloading of the Motor Vehicle against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of

 (*a*) death of or bodily injury to any person

 (*b*) damage to property.

2. In terms of and subject to the limitations of and for the purposes of this Section the Company will indemnify any Authorised Driver who is driving the Motor Vehicle provided that such Authorised Driver (i) shall as though he were the Insured observe fulfil and be subject to the Terms of this Policy insofar as they can apply (ii) is not entitled to indemnity under any other policy.

SCHEDULE

Authorised Driver: Any of the following "(*a*) The Insured. (*b*) Any person provided he is in the Insured's employ and is driving on his order or with his permission.

Provided that the person . . ."

It was argued that there was, accordingly, what I will term a twofold indemnity. There might seem to be some confusion or duplication for para. 1 indemnifies the Insured, para. 2 perhaps indicates that the description of the authorised driver does not apply to the Insured and the Schedule covers both the Insured and others within the definition of such driver. But I think that the provisions can be reconciled, for para. 1 shows the extent of the liability whilst para. 2 and the Schedule help to localise the issue by indicating who may (and thus who may not) lawfully drive the vehicle.

One of the questions which must be answered is whether description (*b*) of the definition of an authorised driver is, or is not, repugnant to s. 8 of the Act. But though I shall not need to set this section out I would set out parts of other sections of the Act. Thus, s. 4 states that:

". . . it shall not be lawful for any person to use, or to cause to permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance . . . in respect of third party risks as complies with the requirements of this Act."

And s. 5 provides that:

> "In order to comply with the requirements of section 4 of this Act, the policy of insurance must be a policy which:
>
> (*a*)
>
> (*b*) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road."

Those two sections do no more than to provide for the minimum required cover in respect of a policy of insurance in the circumstances envisaged. But when a policy of insurance comes into being, other provisions of the Act need to be considered, e.g., ss. 8 and 16 as to conditions and s. 10 as to the insurer. Subsection (1) of the last-mentioned section provides that:

> "If, after a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (*b*) of section 5 of the Act (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay . . ."

I draw attention to the words "any person insured by the policy". You cannot have an insurer unless you have a contract of insurance under which someone has accepted that status. The subsection recognises this to be so. But it makes such insurer liable notwithstanding that he may have the right to cancel or avoid or that he may have cancelled or avoided the policy. There have been arguments for and against it and the point is none so easy to resolve, but I do not think that you can pray the subsection in aid if there is no policy of insurance in force because the one which existed lapsed before the event relied on occurred. You cannot, it seems to me avoid a contract save it be in existence and there is no need to, and I doubt you can, cancel a policy if it is not there for cancellation. I believe that when the vehicle was transferred to the company, the policy lapsed so that there was nothing to avoid or to cancel. As Goddard, J., (as he then was) put it in *Peters v. General Accident and Life Assurance Co*., [1937] 4 All E.R. 628 at p. 634:

> "As to the question of what happened to the policy, I think the policy lapsed. I think that there was thereafter no policy in existence upon this car because the only person who was insured was Mr. Coomber and Mr. Coomber had parted with the car . . . in *Rogerson's* case . . . The House of Lords held that the subject of insurance was a motor car, and that if the motor car was sold, the insurance lapsed . . . Can it be said here, by any stretch of imagination, that Mr. Pope was driving by the order or with the permission of Mr. Coomber? It seems to me that it is quite impossible to say that . . . I am bound to hold that, when Mr. Coomber parted with his car, his insurance qua that car lapsed, and that there was no insurance. Therefore I decide, first of all, that there was no insurance at all in force on the car at the time."

The case went to appeal and is reported in [1938] 2 All E.R. 267 et seq. At p. 269 of the report Greene, M.R., thought it a "perfectly clear case" and that:

> "When Pope was using that car he was not using it by the permission of Coomber. It is an entire misuse of language to say that."

If then I am right and the policy lapsed, not only was there no policy in force as from the time of the transfer of the vehicle, so that s. 10 cannot be relied

on by the plaintiff, but Mr. Kihanya as insured could not have given any order or permission to drive the vehicle. In any event the evidence about his having given such order or permission as secretary was, as I pointed out, contradictory. Indeed I do not think that it can be said to have been established upon the facts that such permission or order was given by him in any capacity.

I looked through *Cross*' case to see whether objection was anywhere taken to the words "driving on the Insured's order or with his permission" and unless I have overlooked something it was not commented upon. I will be dealing with the matter of "authorised driver" in a moment, but I would now say that I do not think that the words "and is driving on his order or with his permission" are, as has been suggested, for excision because of s. 8.

The mischief aimed at by the Act is "injury to third parties . . . from the use of the vehicle on the road either by himself or by some other person or persons . . . but, whoever is specified in the policy as covered in relation to the user of the vehicle, that cover must be against 'any liability which may be incurred' by the owner of the specified person . . .": ([1968] E.A. at pp. 95 and 96). On the latter page the learned Vice-President (as he then was) said:

> "It is urged on behalf of the insurers that where a policy purports to provide to the specified person a general cover but there is a condition which ab initio excludes liability from arising, as for example a provision that the insurer is not liable if the person specified in the policy is disqualified from holding a licence, then the provisions of this section do not nullify such a condition. It is urged that such a condition takes effect before the event giving rise to the liability occurs and that section 8 only applies to events that happen after the liability has arisen."

And he rejected it. It is argued that this is incorrect. But I am bound by the decision in that case and in any event the circumstances there referred to are dissimiliar from those before this Court. The judgment, at p. 97, recognises, indeed, that there may be such different circumstances for it says:

> "While in other circumstances a proviso may have such an effect, I am satisfied that such is not the position here."

There must be a reason for having the two expressions "persons" and "classes of persons" in s. 5 (*b*) and I venture to say that the draughtsman must have contemplated business and private requirements. If that is so then employees are an obvious class. It is true that the word "provided" is used in the policy but one must remember that the "label", as the dissenting judgment pointed out, does not matter and that a "proviso" is not necessarily a condition rendered ineffective by s. 8. In the present case I see nothing of a general cover with an ab initio condition excluding liability in the classification in the policy. What I do see is a provision which might very well have read "(*b*) Any employee of the Insured who is driving on his order or with his permission". And that is not objectionable at all. Accordingly the vehicle was being driven by someone who was never contemplated by the policy – in principle it is just as if a thief were driving the vehicle – and I do not see how the Act can be relied on by the plaintiff. It might be suggested that s. 10 could be so relied on, but it concerns itself with "such liability as is required to be covered by a policy under paragraph (*b*) of section 5 of this Act (being a liability covered by the terms of the policy)" and there cannot, in the circumstances, be such a liability, for the parties to an insurance contract may choose who will be covered.

In other words "such liability . . ." must mean "such liability . . . on the part of a person, persons or class of persons covered by the policy".

It is my finding, then, that the policy issued by the defendant was not in force at the material time, that the vehicle was not being driven by an authorised driver in terms of the policy nor was it being used in accordance with the policy at that time, that s. 10 (4) of the Act is inapplicable to the circumstances of the case, and that the defendant is not liable to satisfy the judgment obtained against the driver and Mr. Kihanya. There must be judgment for the defendant with costs and I so order. It is clearly a case for the award of a certificate for Queen's Counsel and junior Counsel and I certify accordingly.

Case dismissed.

For the plaintiff:
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Macdougall and Wollen, Nairobi

For the defendant:
JA Mackie-Robertson QC and *VRD Patel*
JJ Patel & Co, Nairobi

Republic v The Commissioner for Co-Operative Development ex p Kabuthi and others
[1969] 1 EA 168 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	26 July 1968
Case Number:	773/1968 (19/69)
Before:	Trevelyan J
Sourced by:	LawAfrica

[1] Arbitration – Statutory arbitration – Refusal to appoint – Remedy.

[2] Co-operative Societies – Dispute with employees – Whether within s. 80, *Co-operative Societies Act* (*Cap.* 490) (*K.*).

[3] Co-operative Societies – Claim for debt or demand by member against society – Whether within s. 80 *Co-operative Societies Act* (*K.*).

[4] Prerogative Orders – Mandamus – Whether the proper remedy against the Commissioner for Co-operative Development.

Editor's Summary

The applicants requested the Commissioner for Co-operative Development to appoint an arbitrator under

s. 80 of the Co-operative Societies Act (Cap. 490) to determine disputes between the applicants and a co-operative society. Three heads of the dispute concerned the applicants as employees of the society, one was a claim by them on the society for dues for coffee and the fifth was expressed to be the manner in which the Society's business was being run by the Committee. Although the Commissioner wrote saying that an arbitrator had been appointed, no appointment was in fact ever made and the applicants applied for an order of mandamus to compel him to make the appointment. For the respondent it was contended that mandamus ought not to be granted when there was another remedy and also that the disputes were not disputes within s. 80 of the Co-operative Societies Act.

Held –

(i) no other remedy exists to make the Commissioner of Co-operative Societies carry out his statutory duties and therefore mandamus may issue if he refused to perform them;

(ii) none of the "disputes" were disputes within s. 80 of the Act:

(*a*) as regards three disputes since they were between the society and the applicants as its employees and not as members;

(*b*) as regards the fourth dispute, since it was a claim against the society for a debt or demand due to a member; and

(*c*) as regards the fifth dispute since it was not in fact a dispute at all.

Cases referred to in judgment:

(1) *Morrison v. Glover* (1849), 4 Ex. 430; 154 E.R. 1281.

(2) *Western Suburban Notting Hill Permanent Benefit Society v. Martin* (1886), 17 Q.B.D. 609.

(3) *The Queen v. Registrar of Joint Stock Companies* (1888), 21 Q.B.D. 131.

(4) *Turnock v. Sartoris* (1889), 43 Ch. D. 150.

(5) *Benjamin Kavoloto v. Lukenya Ranching & Farming Society Ltd*., Nairobi H.C.C.C. No. 931 of 1966 (unreported).

Judgment

Trevelyan J: This is an application by Stanley M. Kabuthi and James K. Gatimu (whom I shall refer to as "the applicants" for Muthii Mithamu is now dead) that an order for mandamus shall go to the Commissioner for Co-operative Development directing him to exercise his powers under s. 80 of the Co-operative Societies Act (No. 39 of 1966) either to appoint an arbitrator or arbitrators to determine the disputes which they say exist between them and a certain co-operative society, or to refuse to make such appointment. (I shall refer to the Commissioner as "the Commissioner" and to the Act as "the Act".)

A reference was submitted to the Commissioner on August 10, 1967, but though on April 26, 1968, he wrote to say that an order appointing a certain advocate in respect of it had that day been signed and forwarded to him, that, says learned Senior State Counsel, is not so. Why the letter was written, and in what circumstances, I do not know. But that the Commissioner allowed the matter to drag on for months is, to my mind, indefensible. He thought he had a duty to perform and it is for comment that instead of doing what he thought the law required him to do he felt it necessary to oppose this application instead. But he has opposed the application, and, as will appear, he has (subject as will be stated) succeeded in his opposition.

It has been argued on the authority of *The Queen v. Registrar of Joint Stock Companies* (1888), 21 Q.B.D. 131, that mandamus ought not to be granted where another remedy is provided which is not less convenient, beneficial and effectual. I agree. There are, indeed, other authorities to the same effect. But no other remedy exists to make the Commissioner carry out his statutory duties if he refuses to perform them. State Counsel referred to p. 202 of Short and Mellor's THE PRACTICE ON THE CROWN SIDE OF THE KING'S BENCH DIVISION OF HIS MAJESTY'S HIGH COURT OF JUSTICE (2nd Edn.) where it says:

> "It is somewhat difficult to reconcile all the cases on this point, although it seems that the general principle running through all of them is, that where in the absence of any other equally appropriate remedy, a statutory obligation is cast upon servants of the Crown to do some ministerial act necessary to enable a claimant to make good his claim to relief, mandamus will issue; but it must clearly appear that the Statute imposing the obligation does create a duty towards the applicant."

At all events I am dealing with the application.

Section 80 (4) of the Act provides that:

“The Commissioner shall, on receipt of a reference under subsection (1) of this section, and on being satisfied that a dispute exists, refer it for

> determination to an arbitrator or arbitrators . . . in the prescribed manner . . . Provide that . . . (ii) where any of the parties insist on being represented by an advocate, the Commissioner may refuse to act under this section . . .”

He received a reference and thought that a dispute existed. Apart from the delay though he now tries to explain it away and to say that he did not refuse to act, his affidavit states that the claims made by the applicants are made by them as employees rather than as members of the society as such so that:

> “. . . the same are not a dispute as defined in section 80 of the said Act.”

Strictly speaking, therefore, as he received a reference, knew that the parties insisted on representation and was satisfied that a dispute existed, he was duty bound to refer it to arbitration or to say that he would not do so, which he did not do, and when one also bears in mind the contents of his affidavit it is idle for him to contend that he did not refuse to act.

Section 80 (1) and (6) of the Act provide:

> “(1) If any dispute concerning the business of registered society arises . . . (*b*) between members . . . and the society . . . it shall be referred to the Commissioner . . . (6) The award of the arbitrator shall be final . . .”

The applicants say that there are disputes within (*b*) aforesaid but they recognise that some of their claims are by themselves as employees rather than as members of the society. It must, then, first be decided what disputes are within the contemplation of the Act.

Various authorities were referred to the Court and these, and others, have I consulted though, in the end, it is the language of the Act that must be interpreted. Moreover it must not be forgotten that, except for one decision, that of my brother Mosdell, J., to which I shall again be referring, the others are upon different enactments. In relation to Friendly Societies, 18 Halsbury’s Laws (3rd Edn.) pp. 64 and 65, paras. 121 and 123, state:

> “121. *Provisions in rules for settling disputes* . . . Every dispute falling within certain categories must be decided in the manner directed by the rules of the society . . . 123. *Classes of dispute* . . . Such disputes must have relation to the membership of the member . . . Disputes between a society and a member not in his capacity as member, for example, a claim by a society against one of its officers for misappropriation of funds . . . are not disputes within the class . . .”

In *Morrison v. Glover* (1849), 4 Ex. 430 at p. 444; 154 E.R. 1281 at p. 1287, Pollock, C.B., had this to say:

> “. . . On consideration we are of the opinion, that if any other rule be established than this, that matters in difference between the society and its members, in the character of members, can alone be referred to arbitration; if we go one step beyond that, then extraneous matters of any kind, which happen to be in dispute between the society and any of its members, ought to be the subject of a reference. It appears to us, therefore, that the words “matters in dispute” must be read matters in dispute between the society and its members as members, and not in any other capacity. Such being our opinion, this plea, which sets up the necessity of a reference to arbitration as a bar to the whole of the plaintiff’s cause of action (part of which clearly was not a matter in dispute between the society and the defendant as a member, if the rest was) is a bad plea. The demurrer must therefore be allowed, and the plaintiffs are entitled to judgment.”

In those days rules of pleadings were more strict than in this day and age and where some claims in a reference are “disputes” and some are not, an

application for mandamus would not today fail simply because of that. It was however argued before me that as multiplicity of proceedings is for avoiding, if there be disputes both within and without the Act, then all of them should be tried in the ordinary way before the courts. In support of this contention I was referred to *Turnock v. Sartoris* (1889), 43 Ch. D. 150 at p. 156 that:

> "Then it was contended that at all events the question arising under the lease was the principal matter in dispute, and that it ought to be referred, leaving the action to proceed only as to matters not arising under the lease. I think that such a course would not be right. It cannot be right to cut up this litigation into two actions, one to be tried before the arbitrator, and the other to be tried elsewhere."

The facts of that case were, however, very different from those before this Court. There was a lease and not all of the disputes arose out of it, so that it was, with respect, right not to cut the litigation up. But where a statute says that certain matters are to be dealt with in a certain way that is how they are to be dealt with and there must be a separate trial for extraneous disputes.

Not a great deal of help is to be got from *Western Suburban Notting Hill Permanent Benefit Society v. Martin* (1886), 17 Q.B.D. 609. The word "dispute" was statutorily defined. But it is worth quoting something said, at p. 617, by FRY, J.:

> "There are three sorts of disputes which may occur between a building society and one of its members; first, disputes arising out of the social contract; secondly, disputes collateral to the social contract, such as those arising out of mortgages between the society and its members; and thirdly, disputes entirely extraneous to the social contract, such as a dispute in respect of work done by a member for the society."

The case of Mosdell, J., to which I have referred is *Benjamin W. Kavoloto v. Lukenya Ranching & Farming Society Ltd*. (this Court's civil case 931 of 1966 (unreported)) which was a claim for damages for wrongful dismissal. In it the learned judge said:

> ". . . The plaintiff is suing the defendant Society not as a member but as an ex-employee, his status of member, qua the suit, being in my opinion, merely co-incidental.
>
> Lastly, I am doubtful if a dispute between an ex-employee and the defendant Society can be said to be 'a dispute concerning the business of a registered Society'. The business of the defendant Society appears to me to be concerned with farming and its produce and not with the terms of the plaintiff's contract of employment with the defendant Society."

It is my view that the language of Pollock, C.B., in *Morrison v. Glover*, (above) is particularly for adoption. Section 80 (1) (*b*) of the Act refers to disputes between members (and past or deceased members) and, not merely the society, but its committee or any officer of the society as well. It seems to me that the sort of dispute which it contemplates (which must "concern the business of" the society) must be of a domestic nature, i.e. between a member as such member and the society its committee or officers, as such society, committee or officers respectively. Moreover, by s. 80 (2) a claim by a society for a debt or demand due to it from a member or past member etc. is declared to be a dispute. This, I think, goes to show that (save as provided for) debts and demands due are not disputes within the Act.

Applying the foregoing to the four heads of reference, none is a dispute within the meaning of the Act. The applicants admit that three of them are made as employees, or rather ex-employees, rather than as members, another is for dues for coffee, which is, therefore, in respect of a debt or demand, and the fifth which reads:

> "Generally but without prejudice to the foregoing. The manner in which the Society's business is being run by the Committee."

does not seem to me to be a "dispute" at all.

There was a time when the Commissioner, having had the reference and being satisfied that a dispute existed, should have appointed or refused to appoint an arbitrator or arbitrators but later he had second thoughts about it and now I have found that no dispute exists. The order is therefore discharged. Each party will bear its own costs. The applicants sent their reference to a public officer whom they were entitled to assume knew his duties. He, apart from the great and unwarranted delay, led them to believe that they had taken the right course. They then took what appeared to be the only procedure open to them after which the Commissioner, for the first time, took the point that there was no dispute within the Act.

Application dismissed.

For the applicants:
AF Morrison & KH Osmond
Archer & Wilcock, Nairobi

For the respondent:
JF Shields (Senior State Counsel)
The Attorney-General

For the interested party:
AB Shah
Kantilal A Shah & Co, Nairobi

Waweru v Kiromo
[1969] 1 EA 172 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	16 December 1968
Case Number:	124/1967 (20/69)
Before:	Trevelyan J
Sourced by:	LawAfrica

[1] Civil Practice and Procedure – Service – Attempt to serve defendant at his house – When defendant

cannot be found – Whether service effective – Civil Procedure (*Revised*) *Rules* 1948, *O.* 9, *rr.* 10 *and* 24*; O.* 5, *r.* 12 (*k.*).

Editor's Summary

The defendant applied to set aside the service on him of a summons. The affidavit of the process server stated that the summons had been left with the defendant's wife with instructions that she should keep it for her husband as he was not present at the time.

Held – As the process server made no enquiry about the defendant's whereabouts it could not be said that he could not be found, so as to allow service on his wife under O. 5, r. 12, Civil Procedure (Revised) Rules 1948.

Application allowed.

Cases referred to in judgment:

(1) *Eravi Pillai v. Maluk Mohammed*, A.I.R. 1953 (Travancore-Cochin) 494.

(2) *Muchiram Chand v. Paresh Nath Maity and others*, A.I.R. 1956 (Calcutta) 208.

(3) *Erukana Kavuma v. S.T. Mehta*, [1960] E.A. 305.

(4) *Pirbhai Lalji and Sons Ltd. v. Hassanali Devji*, [1962] E.A. 306.

(5) *M.B. Automobiles v. Kampala Bus Service*, [1966] E.A. 480.

Judgment

Trevelyan J: The defendant moves to have set aside an *ex parte* judgment and decree of this Court on the ground that the plaint and summons to appear were not served, or were not properly served, upon him.

In his affidavit of March 9, 1967, the court process server, after stating that he received the proceedings for service upon a man called Kori Kiromo of Tinganga Village, Kiambu goes on to say that:

> "The said Mrs. Moruga Kori was at the time personally known to me, and I served the said summons on her on the 7th day of March, 1967, . . . at Tinganga Village by tendering a copy thereof to her . . . for her husband Mr. Kori Kiromo whom I found not present."

If, then, it is to be taken that the process server personally knew Mrs. Kori (as he seems to indicate that he does) there should have been no need for her to have been pointed out to him, unless he knew her as Mrs. Kori but not as the defendant's wife. But he further avers that:

> "The said Headman Githuo not being personally known to me, he accompanied me to the defendant's home and there pointed out to me a person whom he stated to be a wife to the defendant . . . summons was . . . served personally on Mrs. Moruga Kori . . . by giving her summons with the instructions that she should keep it for her husband as he was not present at the time . . ."

There is confusion there, but what the process server obviously means is that as Mr. Kiromo's wife was not personally known to him, he called upon the headman to assist him in identifying her and that he served her with the papers after such identification was made.

Mrs. Kiromo denies that the process server called upon her, and the headman says that he has never been with him for the purpose of serving anything upon her. Widening the issue, the plaintiff's advocate Mr. G. S. Vohra swears that between March 9 and April 10, 1967 (he does not give the exact dates):

> ". . . on the first occasion when the defendant visited me he introduced the subject by handing over to me a copy of the summons to enter appearance and copy of the plaint attached thereto that he had received. I attach the same herewith . . ."

whilst the defendant swears that he has never, at any time, been to Mr. Vohra's office.

We have, then, the most serious of allegations and cross-allegations which must be thoroughly investigated and as I need come to no concluded decision as to whether the papers were or were not served upon Mrs. Kiromo, I will merely point to the presumption as to service: see *M.B. Automobiles v. Kampala Bus Service*, [1966] E.A. 480, say that the defendant accepted, and in my view rightly accepted, that the burden of proof as to non-service was upon him, and comment that the defence allegations postulate a conspiracy between an advocate and the court process server. And I turn to the question as to whether, assuming the facts to be as the process server claims them to be, service was or was not a proper and effective service.

The claim was for damages for assault. On April 12 Mr. Vohra applied *ex parte* for a formal proof – presumably under O. 9, r. 6 of the Civil Procedure (Revised) Rules 1948 – to be taken. A date was fixed and, ultimately, on June 16, judgment was entered in favour of the plaintiff for Sh. 36,050/- and costs upon which a decree was later extracted.

Three provisions of the aforesaid Rules are particularly to be consulted. They are O. 9, r. 10 which says:

> "Where judgment has been passed pursuant to any of the preceding rules of this Order . . . it shall be lawful for the Court to set aside or vary such judgment on terms as may be just";

order 9, r. 24 which lays down that:

> "In any case in which a decree is passed *ex parte* against a defendant he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served . . . the Court shall make an order setting aside the decree as against him on such terms as to costs, payment into court, or otherwise as it thinks fit and shall appoint a day for proceeding with the suit . . .";

and O. 5, r. 12 which reads:

> "Where in any suit the defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on adult member of the family of the defendant who is residing with him."

As I shall be referring to some Ugandan and Indian authorities I point out that O. 5, r. 12 is reproduced in Uganda as O. 5, r. 14 of its Rules and that it derives, as I think it must derive, from O. 5, r. 15 of the Indian Civil Procedure Rules which is in these terms:

> "Where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult member of the family residing with him."

All three rules have in common, *inter alia*, the words "cannot be found" and "residing with him".

These two sets of words were considered and commented upon in regard to the Indian rule, by the learned editors of Rao's "The Code of Civil Procedure" (3rd Edn., 1963), where at pages 1354 and 1355 they say:

> ". . . The rule can have no application unless it is established that the defendant could not be found. A service . . . without adequate enquiry that the defendant cannot be found would not be sufficient service . . . It cannot be said that the defendant cannot be found, merely because he is not at home . . . when the serving peon went to effect service . . . The question whether service on an adult male member of the defendant's family residing with him is proper service may be a mixed question of law and fact and sometimes of fact or law alone."

With respect, I agree with what is there said. (The cases of *Muchiram Chand v. Paresh Nath Maity and Others*, A.I.R. 1956 (Calcutta) 208 and *Eravi Pillai v. Maluk Mohammed*, A.I.R. 1953 (Travancore-Cochin) 494 which they refer to were handed up and I need say no more about them save that they support the commentary made.)

Sir Audley McKisack, C.J. considered the words "cannot be found" in two Ugandan cases, *Erukana Kavuma v. S. T. Mehta*, [1960] E.A. 305 and

Pirbhai Lalji & Sons Ltd. v. Hassanali Devji, [1962] E.A. 306 and he was in no doubt that they were entitled to their due weight. In the former case he said, at page 306:

> "All that the process server, in his affidavit, says on this point is that he went to the defendant's shop and
>
> > 'there I did not find the defendant; I was told that the defendant is in India'.
>
> This seems to me a most inadequate ground for saying that the defendant could not be found. The affidavit does not reveal whether or not any inquiry was made about the defendant's address in India, or whether it was expected that the defendant would return from India, and if so, when . . ."

And in the latter case he said:

> "In the instant case also I think that no proper inquiry was made as to the defendant's whereabouts, and the process server does not appear to have taken any sufficient steps to establish that the defendant could not be found. All that his affidavit shows is that the defendant was away from his house on the several occasions when the process server called there on two consecutive days. I accordingly hold that service on the defendant's wife was not effective."

In the case now before the Court the process server made only one visit which happened to be at a time when the defendant was not present. For all we know the defendant was just out of earshot or due back within the hour. No enquiry at all was made about his whereabouts and it cannot possibly be said that he could not be found. I will leave open the question as to whether it has been established that Mrs. Kiromo was "residing with" the defendant because it makes no difference to my decision whether she was or was not, but I will say something about the matter of residence generally. In this country, a good number of wives tend the family land whilst the husband is at work elsewhere and, where this is so, if proceedings served upon the wife reach him at all, they may do so too late to enable him to take the appropriate step in the action. It is because of this, as I believe, that O. 5, r. 12 particularly refers to the matter of residence and why the requirement should be carefully borne in mind whenever service is sought to be made under the rule. Certainly should there be a reference to it in the affidavit of service.

I was asked, but I am not prepared, to equiparate "receipt" of a summons with its "service". Counsel could find no authority to support this, and there are a good number of provisions as to service in our Rules to show that it ought not to be so and, of course, there is O. 9, r. 24 which I have earlier set out in full to show just how important service is because it says:

> "if he satisfies the Court that the summons was not duly served . . . the Court *shall* make an order setting aside the decree . . ."

In any event a bad service remains a bad service. It is not transmuted into a good one because, in some fashion or other the defendant, at some point of time has come into possession of, say, the summons. How many days, for instance, would he have to enter an appearance? The days must be related to "service" and that must mean a proper service. An unconditional appearance which a defendant makes usually amounts to a waiver of the irregularity but there was none here.

It is agreed that if the proceedings are set aside the prohibitory order already made shall, nonetheless, remain in force until further order which I think to be a fair and reasonable condition in the circumstances obtaining.

In the result the *ex parte* judgment and decree are set aside and the defendant is given leave to defend on the agreed terms to which I have referred. He will have fifteen days from the due service of proceedings upon him to enter an appearance to the summons and a further period of fifteen days from such entry in which to file his defence to the plaintiff's claim. Costs are reserved.

Order accordingly.

For the applicant:
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For the respondent:
SS Mandla
GS Vohra, Nairobi

Tamano v Republic
[1969] 1 EA 176 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	28 November 1968
Case Number:	1106/1968 (171/68)
Before:	Trevelyan J
Sourced by:	LawAfrica

[1] Appeal – Retrial – Whether court should order – Criminal Procedure Code (*Cap.* 75), *s.* 354 (*K*).

[2] Traffic – Driving under the influence of drink – Plea to being in charge of a vehicle under the influence of drink – Traffic Act (*Cap.* 403), *s.* 44 (*K*).

Editor's Summary

The accused was charged with driving a vehicle whilst under the influence of drink. Section 44 (1) of the Traffic Act (Cap. 403) (K) provides for three different offences: "driving", "attempting to drive", and "being in charge of a motor vehicle". The accused pleaded guilty to "being in charge of" a vehicle whilst under the influence of drink to such an extent as to be incapable to having proper control of the vehicle, and the accused was convicted and sentenced.

Held –

(i) the accused was never charged with "being in charge" of a motor vehicle, and accordingly the conviction and sentence must be set aside;

(ii) the court in its discretion should order a retrial.

Conviction and sentence set aside and retrial ordered.

Cases referred to in judgment:

(1) *R. v. Sheridan*, [1937] 1 K.B. 223.

(2) *Mutemba s/o Rutchomba v. R.* (1953), 20 E.A.C.A. 276.

Judgment

Trevelyan J: The appellant, a veterinary officer, was charged under s. 44 of the Traffic Act (Cap. 403) (which I shall refer to as "the Act") with driving a motor vehicle whilst under the influence of drink, if I may so put it, and pleaded not guilty to the charge. A date was given for the case to be mentioned, and thereafter, according to the record of the proceedings, the appellant said:

> "It is true that I was in charge of the vehicle and was under influence of drinks to such an extent that I was incapable to control the vehicle."

But in his affidavit in support of his petition of appeal the appellant says that when the magistrate announced the mention date and as he was in custody, he told the court that it was true that he was under the influence of drink but

that he was not driving and was not in the vehicle when he was, as he puts it, picked by police. The two versions of what was said are very different, and it is to be taken that the allegation is that the magistrate recorded words which the appellant never uttered. As this will need thoroughly to be investigated and a decision on it is unnecessary in this appeal, I shall say no more about it but will return to the affidavit where the appellant says:

> "At this point I did not know what the learned magistrate said but the police prosecutor made a submission similar to the one recorded whereupon I was told by the said magistrate if I had anything to say. I stated the following facts."

Let us leave those facts for a moment to see what the prosecutor said, and let us remember that the appellant is a veterinary officer and that a veterinary officer is not to be taken as a man of no education. The prosecutor told the magistrate:

> "Driving under the influence of drink is one of the serious offences as far as Traffic Act is concerned. We are always having deaths in road accidents caused by people of the accused's calibre. I pray that the court take a serious view and make an order disqualifying the accused from driving."

Can it possibly be that the appellant did not know that what he had told the court had been interpreted as a plea of guilty and that, at any rate so far as the prosecutor was concerned, there was a conviction upon that plea? I believe not. But that is what I think the appellant suggests. Surely, if the appellant's intention had been to plead not guilty, he would have told the magistrate there and then that a mistake had been made. But that he did not do.

However, let us once again resume at the place where we left the appellant's affidavit. We have this:

> "I was in a party yesterday at Walton Inn where the Japan Government was presenting gifts to Embu District. I stayed there for a short time, then I went to another place where I was with a friend having drinks and later taken by police who said I was drunk. I had decided earlier not to drive but leave the car where it was parked."

This is for comparison with what the magistrate recorded for it is so very different, reading:

> "I happened to be in a party where the Japan Government was presenting gifts to Embu District. I stayed there for a time, when I got to a point where I was found by some police constables who said I was drunk and took me in. I had realised that I would not drive any more and stopped the vehicle where I was near Walton's Inn."

But this aspect of the case, also, I need not go into because, from the moment that the appellant stopped addressing the magistrate on the occasion when what he said was treated as a plea of guilty, the rest of the proceedings was a nullity. However, before explaining why this was so, I should say that State Counsel was not, as he should have been, served with a copy of the affidavit before arriving at court for the hearing of the appeal, but, with some courage, undertook, nevertheless, to go on with the hearing without insisting upon an adjournment.

Section 44 of the Act provides:

> "(1) Any person who, when driving or attempting to drive, or when in charge of a motor vehicle on a road or other public place, is under

> the influence of drink or drugs to such an extent as to be incapable of having proper control of the vehicle shall be guilty of an offence . . .
>
> (2) A person convicted of an offence under this section shall, unless the court for special reason thinks fit to order otherwise, and without prejudice to the power of the court to order a longer period of disqualification, be disqualified for a period of six months from the date of conviction for holding or obtaining a licence."

It follows from a reading thereof and what the appellant said, that is, what according to the record he said, that he appears to have pleaded, or to have purported to plead, to an offence with which he was not charged. The subsection provides for three different offences, "driving", "attempting to drive" and being "in charge", etc. Once the magistrate had come to the conclusion that the appellant seemed to desire to plead guilty to the offence of being "in charge", a formal charge for this offence should, upon the prosecution requesting or consenting to this being done, have been framed and put to the appellant. An accused can only plead guilty to what is charged against him or to some other offence where the law allows this to be done. Here there is no such authority; or so I think. It certainly cannot be said, for instance, that being "in charge" is a minor offence to that of "driving" for they have equal maxima by way of punishment, though in practice the former is generally thought to be a less serious offence than the latter. Accordingly the conviction entered by the magistrate, if it can be said that there was a conviction, cannot be allowed to stand and the sentence and order passed thereafter must fall with it. This result may also have been inevitable for another reason, though I need not finally decide it, namely that it is at least open to doubt that the record shows that what was charged as having taken place, took place, "on a road or other public place". (There are various decisions as to when certain terrain is and is not within such definition, but I am referring to what was actually said at the hearing.)

Matter about procedure was raised at the hearing of the appeal and I must say something about it. When the magistrate wrote down what he did and treated it as a plea of guilty, he followed it with the letter "G" which in the circumstances must have been his abbreviation for "Guilty". We do not know, for the record is silent about it, what language was used – it is a better practice always to record the language or languages used at a trial – but in this country, where English is not used by an accused, to follow what he has said in answer to a charge with the letter "G" or (as is more often the case) with the letters "G.O.P." (signifying "Guilty on Plea") is ordinarily to be taken as meaning no more than that the magistrate has accepted that the accused has pleaded guilty, just as if he had used that word in the English tongue. It does not, of itself, necessarily mean that the magistrate has convicted upon it. It is to be observed that s. 207 (2) of the Criminal Procedure Code (which I shall refer to as "the Code") merely provides that:

> "If the accused person admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence against him, unless there appears to it sufficient cause to the contrary."

so that it does not, in terms, require a conviction to be written into the record. But in practice this should be done. "Convicted of the offence charged" or some other appropriate words should always be recorded. There is authority in England that a conviction is complete when it is announced in court by a magistrate even though no entry has been made in the court's register to that effect: *R. v. Sheridan*, [1937] 1 K.B. 223; and I see no reason why it should

not be so and why it should be so in this country as well. But the record, as I have said, ought to say something about it.

The petition of appeal contains a ground that the sentence and order of disqualification are "harsh and excessive". I shall say nothing now about the fine imposed but I will say that the reference to the disqualification is surprising. The period awarded was the norm mentioned in section 44 (2) of the Act and not a word was mentioned to the magistrate about any special reason. A memorandum of appeal, the Court of Appeal has said, should bear an intelligent relation to the facts: *Mutemba s/o Rutchomba v. R.* (1953), 20 E.A.C.A. 276.

The record leads one to believe the magistrate intended to convict the appellant and must have thought that he had done so – punishment would not, otherwise, have been inflicted. I quash the conviction and set aside the sentence of a fine (with its default sentence) and the order for disqualification. The fine must, of course, be repaid. I am asked to order a retrial. Section 354 of the Code gives the court a discretion, when hearing an appeal against conviction, to order an appellant, who has neither been acquitted nor discharged, to be tried by a court of competent jurisdiction. Certainly the appellant should stand trial and I make an order within the section accordingly.

Order accordingly.

For the appellant:
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For the respondent:
WB Waweru (State Counsel, Kenya)
Attorney-General, Kenya

Mafabi v Uganda
[1969] 1 EA 179 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	11 December 1968
Case Number:	584/1968 (177/68)
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Criminal Law – Jurisdiction – Magistrate grade 1 *– To take over a case de novo from a chief magistrate who had ceased to exercise jurisdiction in the area – Criminal Procedure Act, s.* 200 (*U.*) *– Magistrates' Courts Act, ss.* 23 *and* 27 (*U.*).

Editor's Summary

On November 28, 1967, the chief magistrate at Mbale started to try an accused of robbery. Evidence of two witnesses for the prosecution was taken, and then adjourned to December 8, 1967 for the taking of further evidence. A further sixteen adjournments were recorded, on two of which occasions it was said the chief magistrate was sick. On June 12, 1968 the accused appeared before a 1st class magistrate and the prosecutor applied for the case to be tried de novo by him. The 1st class magistrate heard the case de novo and ultimately convicted the accused and then referred the case to another chief magistrate for sentence. The previous chief magistrate had left the area of Mbale. On appeal (against finding and sentence) the State Attorney raised as a preliminary point of law that the trial was a nullity on the grounds that the magistrate grade 1 had no jurisdiction to try the case de novo. It was argued that (i) the magistrate grade 1 had no jurisdiction unless the chief magistrate had ceased to exercise his jurisdiction in the case – s. 200, Criminal Procedure Act (U.), and (ii) the magistrate grade 1 in order to exercise jurisdiction required an order from the chief

magistrate specifically transferring the case to the former for hearing and determination – ss. 23 and 27, Magistrates' Courts Act (U.).

Held –

(i) on the facts the previous chief magistrate had ceased to exercise jurisdiction and the magistrate grade 1 had succeeded him, and the latter had powers to try the case de novo;

(ii) sections 23 and 27 of Magistrate's Courts Act (U.) were irrelevant and on the facts it required no specific order from a chief magistrate for the magistrate grade 1 to try this case.

Appeal dismissed. Finding and sentence upheld on the evidence.

No cases referred to in judgment

Judgment

Sir Udo Udoma CJ: The appellant Mafabi Walimbwa was, on October 27, 1967, charged with robbery contrary to s. 272 and punishable under s. 273 (1) (*a*) of the Penal Code. On November 28, 1967 the appellant appeared before the chief magistrate in the magistrate's court, Mbale, and pleaded not guilty on the charge having been read and explained to him. Thereupon his trial was begun before the chief magistrate aforesaid, who after having heard and recorded the evidence of two witnesses for the prosecution adjourned further hearing to December 8, 1967. Thereafter the trial was adjourned from time to time by the chief magistrate without any further evidence being taken and recorded by him. Sometimes, however, the adjournment was granted by the magistrate grade 1 in the absence of the chief magistrate. The trial was finally adjourned on June 7, 1968 to June 12, 1968, by the magistrate grade 1.

On June 12, 1968, when the appellant appeared before the magistrate grade 1, the prosecuting officer applied that the case be tried de novo by the magistrate grade 1 since the chief magistrate was not then available and his witnesses were already losing interest in the case because of perennial adjournments. The application was granted and the magistrate grade 1 took down the plea of the appellant afresh, after the charge had been read and explained to him, and thereafter continued to try the whole case de novo. At the conclusion of the trial the magistrate grade 1 found the appellant guilty and convicted him. As in his opinion the case was a serious one and called for higher sentence, the magistrate grade 1 in the exercise of the power vested in him under s. 10 (4) of the Magistrates' Courts Act committed the appellant to the chief magistrate for sentence.

In the meantime the chief magistrate, who had begun the trial but could not conclude it, had left the magisterial area of Mbale.

As a result the appellant appeared before a new chief magistrate transferred to the area to take the place of the previous chief magistrate. The new chief magistrate sentenced the appellant to ten years imprisonment and five strokes of the cane.

The appellant now appeals to this court against his conviction and sentence on the general ground that the decision of the trial magistrate grade 1 in convicting him was unwarranted, unreasonable and could not be supported on the evidence; and similarly that the sentence imposed upon him by the chief magistrate was severe and harsh and should be reduced, if not set aside.

On the appeal coming up for hearing Mr Odimbe raised a preliminary objection in point of law. He submitted that the trial of the appellant by the magistrate grade 1 was a nullity because, the case having been part-heard by

the chief magistrate, the magistrate grade 1 had no jurisdiction to have tried the whole case de novo; and for that reason he was unable to support the conviction of the appellant. He therefore applied that the conviction of the appellant be set aside and a new trial be ordered by this court. Counsel referred the court to s. 200 of the Criminal Procedure Act and ss. 23 and 27 of the Magistrates' Courts Act as his authority for the proposition that the magistrate grade 1 had no jurisdiction to have tried the case de novo.

Counsel then contended:

(1) that in view of the provisions of s. 200 of the Criminal Procedure Act the magistrate grade 1 could only have exercised his jurisdiction to try the case if the chief magistrate had ceased to exercise his jurisdiction. He said there was no evidence that the chief magistrate at the time when the appellant was tried by the magistrate grade 1 ceased to exercise his jurisdiction in the case, and

(2) that under ss. 23 and 27 of the Magistrates' Courts Act the magistrate grade 1 could only have exercised his jurisdiction if there was an order by the chief magistrate transferring the case to the magistrate grade 1 for due hearing and determination. The chief magistrate had made no such order.

I now proceed to consider these submissions. The relevant provisions of s. 200 of the Criminal Procedure Act are in the following terms:

"(1) Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or trial, ceases to exercise jurisdiction therein and is succeeded, whether by virtue of an order of transfer under the provisions of this code or otherwise, by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly by himself, or he may re-summon the witnesses and recommence the enquiry or trial:

Provided that –

(*a*) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard;

(*b*) the High Court may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was held, if it is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial."

The relevant passage with regard to the matter under enquiry in these provisions is "cease to exercise jurisdiction and is succeeded, whether by virtue of an order of transfer under the provisions of this code or otherwise by another magistrate". In terms of this passage a magistrate may cease to exercise his jurisdiction in a variety of ways and in various circumstances, one of which being the transfer, by an order of court as prescribed in the Criminal Procedure Act and the Magistrates' Courts Act, of the case, the evidence in which he has heard partly or wholly, to another magistrate for due trial and determination. The important point to note is that the succeeding magistrate must have, and be competent to exercise, jurisdiction in the case part-heard or wholly heard by his predecessor. In the instant case both the chief magistrate and the magistrate grade 1 have concurrent jurisdiction over the case according to the provisions of the Magistrates' Courts Act except as to sentences. Therefore the question of jurisdiction does not arise.

In my view the powers conferred on succeeding magistrates, which entitle them to pass judgment in a criminal case on the evidence they never heard and which was given by witnesses they never saw is, to put it mildly, an extraordinary one and difficult to justify, especially in criminal cases.

Be that as it may, the object of the provisions contained in s. 200 of the Criminal Procedure Act was, in my view, to enable succeeding magistrates to dispose of cases, whether part-heard or wholly heard, and to facilitate the work of the court. There is nothing in the provisions prohibiting a magistrate trying a case de novo, which had been previously part-heard by another magistrate who, for one reason or another, is not able to complete the trial up to judgment.

In the circumstances of the instant case in which the chief magistrate, after recording the evidence on November 28, 1967, of only two witnesses for the prosecution, adjourned the hearing to be continued on December 8, 1967, and on December 8, 1967, without any evidence being recorded, and thereafter for one reason or another, including at least two occasions, when it was recorded that the chief magistrate was sick, adjourned the case sixteen times, might it not be said that the learned chief magistrate had ceased of his own volition or for some other cause to exercise his jurisdiction, and that he was therefore succeeded by the magistrate grade 1, who eventually disposed of the case?

The sentence “ceased to exercise jurisdiction therein and is succeeded, whether by virtue of an order of transfer under the provisions of this code or otherwise” must be accorded liberal and very wide interpretation so as not to frustrate the intention of the legislature. In this case “ceased to exercise” must be contrasted with the expression “is divested of jurisdiction” or “is transferred from the area” or “has been dismissed the service”. For a magistrate may cease to exercise his jurisdiction even though he still possesses jurisdiction over the subject-matter.

The ordinary dictionary meaning of the word “cease” is to stop or desist from. One would have thought that, by the chief magistrate failing to exercise his jurisdiction for such a long period of time, the presumption must be that he has stopped or desisted from exercising his jurisdiction or that when the case eventually came before another magistrate such magistrate could be regarded for all practical purposes as having succeeded the magistrate who had commenced the hearing of the case in the first instance. The word “cease” must be understood in its literal meaning.

There is nothing in the provisions of s. 200 of the Criminal Procedure Act which prohibits a magistrate from hearing a case which had been begun by another magistrate. On the contrary by the said provisions a magistrate succeeding another magistrate is empowered to exercise jurisdiction and complete where it was not completed the trial of a case or where it was completed by another magistrate without delivering judgment to deliver judgment from the evidence recorded by a previous magistrate.

It is the duty of the court to interpret an Act of Parliament so as to avoid absurdity. It cannot be said that it was the intention of Parliament to prohibit a magistrate from trying a case de novo, the hearing of which had been begun by another magistrate. One would have thought that by trying the case de novo the succeeding magistrate was facilitating disposal of the case in the interests of the appellant and in satisfaction of the demands of justice. It is not the duty of the court to frustrate the intention of Parliament as may be gathered from the tenor or wording of a statute. Surely in a case of this kind and in the circumstances disclosed by the record of proceedings, it was in the interests of justice that the appellant be accorded a speedy trial.

Sections 23 and 27 of the Magistrates’ Courts Act which were quoted and relied upon by counsel are set out hereunder.

> "23. A Chief Magistrate holding a Magistrate's Court may –
>
> (*a*) transfer any case of which he has taken cognisance for inquiry or trial to another Magistrate holding a court empowered to enquire into or try such case within the magisterial area of the jurisdiction of the Chief Magistrate; and
>
> (*b*) direct or empower any Magistrate holding a Magistrate's Court who has taken cognisance of any case, and whether evidence has been taken in such a case or not, to transfer the inquiry or trial to himself or to any other specified Magistrate within the magisterial area of the Chief Magistrate's jurisdiction, who is competent to try the accused person or commit him for trial, and such Magistrate may dispose of the case according to law."
>
> "27. Where a Magistrate who has commenced any proceedings, whether civil or criminal, ceased to act as a Magistrate, any Magistrate who succeeds him or acts in his place may hear and determine the proceedings ab initio."

It was difficult to follow the submission of counsel in respect to the above provisions with reference to the points in issue in this appeal. As I understand it, if indeed I understand him aright, the contention of counsel was that by virtue of the above provisions the magistrate grade 1 would have been competent to try the case, only if the said case had been transferred by the chief magistrate, who had started the hearing thereof to the magistrate grade 1 for hearing and determination and that in the absence of such transfer the magistrate grade 1 had no jurisdiction to have tried the appellant. It is incomprehensible how this contention is justified by the provisions of ss. 23 and 27 of the Magistrates' Courts Act. This objection, based as it is on ss. 23 and 27 of the Magistrates' Courts Act, can be dismissed summarily as lacking in substance, as what was said by this court as regards s. 200 of the Criminal Procedure Act applies with equal effect to the above stated provisions.

In the case under consideration no question of transfer arises. The case was lying dormant for a period of more than six months while the appellant was still kept in custody for no justifiable reason. There is nothing in the provisions set out above which can be interpreted as precluding another magistrate from trying de novo an accused person whose trial had been commenced but not concluded by a previous magistrate. Those provisions are completely irrelevant to the objection in point of law raised by Counsel for the State. In my view the magistrate grade 1 who reopened the trial of the appellant and later concluded the trial, and, in his judgment, convicted the appellant, as already stated, was not only competent to do so but acted within his jurisdiction according to law.

The evidence accepted and acted upon by the trial magistrate in convicting the appellant, which has been challenged by the appellant in his petition of appeal, was unassailable. The appellant admitted in his testimony that he was on Pallisa Road which has been described as a public highway in Mbale at the material time when the offence was alleged to have been committed. He also admitted being taken in a car that night to the Police Station, Mbale. To a large extent his testimony had corroborated the case of the prosecution against him.

The trial magistrate in his judgment said:

> "Considering the evidence as a whole accordingly I believe the prosecution witnesses and I accept their evidence. I disbelieve the accused who puts up improbable version. . . . It is not in dispute that the place of incident was a

> public highway. I am satisfied that the accused and the watch were sufficiently identified. I consider that there is sufficient evidence to support conviction. I find the accused guilty as charged and I accordingly convict him."

It is impossible to hold that there was no evidence to support these conclusions or that the decision of the trial magistrate was unwarranted, unreasonable and could not be supported on the evidence. This appeal is therefore dismissed. The conviction and sentence are confirmed.

Order accordingly.

The appellant appeared in person.

For the respondent:
RAO Odimbe (State Attorney)

Bhagwanji & Co Ltd v Commissioner for Customs & Excise
[1969] 1 EA 184 (CAE)

Division:	Court of Appeal for East Africa
Date of judgment:	5 December 1968
Case Number:	15/1968 (182/68)
Before:	Sir Charles Newbold P, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya at Nairobi – Chanan Singh, J

[1] Customs and excise – Seizure of goods – Import Licence allegedly forged – Whether forgery perpetrated by company concerned – East African Customs Management Act 1952, *ss.* 155A (*g*) *and* 161 (4).

[2] Customs and excise – Seizure of goods – Notice of seizure – Whether Commissioner bound by reasons given in notice – Proceedings relying on alternative ground – East African Customs Management Act 1952, *s.* 161 (4).

Editor's Summary

The Commissioner of Customs had seized goods belonging to the appellant in the exercise of powers conferred on him by s. 158 of the East African Customs Management Act 1952, on the grounds that the goods were goods in respect of which in a matter relating to Customs a document was forged. The appellant appealed on the ground that there was no proof to link the officers of the company with the forgery and the respondent cross-appealed against a finding by the trial judge that the Commissioner could not rely in the suit, on grounds not given in the notice of seizure of the goods. There was no dispute

as to the fact that the purported licence had been forged and that although rubber stamps and a serial number had been impressed in the licensing office, the signature had been forged. The trial judge interpreted s. 155A of the East African Customs Management Act as meaning "that the document in question should be known to be false or incorrect to the person who delivers it or who makes it or produces it". There was no evidence of guilty knowledge but the judge inferred it. The manager of the appellant company testified that he applied for the licence in the usual way, from the proper authority, and that he received it by post; he believed it to be genuine and, according to the trial judge, seemed to suggest that if it was forged it must have been forged by someone in the Import Licensing Division. In regard to the notice of seizure, the Commissioner relied, in the notice itself, solely on the allegation that the licence was forged in terms of s. 155A (*g*), but in his written statement of defence he relied on an allegation that the goods were restricted goods imported without a valid licence contrary to s. 155A (*b*) and advanced his original ground only as an alternative. The respondent argued that the reasons given in the notice of seizure could not

fetter the power and duty of the court to condemn goods liable to forfeiture under the Act. The respondent relied for this argument on the provisions of s. 161 (4) of the Act which reads: "Where any proceedings have been instituted in accordance with the provisions of this section then – (*a*) if the court is satisfied that such thing was liable to forfeiture under this Act, any such thing shall be condemned."

Held –

(i) it was inconceivable that the licence would have been forged except at the instance of someone who would benefit by it and that could only have been the company;

(ii) the conclusion that some officer or servant of the company was a party to the forgery was irresistible and that was enough to saddle the company with knowledge;

(iii) once a plaint is issued by a claimant, the Commissioner is entitled to resist it on any proper grounds, whether or not they are included in the notice of seizure;

(iv) if the notice of seizure had operated to mislead the claimant the court might have allowed the claimant to amend his plaint, granted any necessary adjournment or penalized the Commissioner with costs.

Appeal dismissed and cross-appeal allowed. Costs of appeal allowed to the respondent and no order as to costs of cross-appeal.

Cases referred to in judgment:

T. M. Bell v. Commissioner of Income Tax, [1960] E.A. 224.

December 17, 1968. The following considered judgments were read:

Judgment

Spry JA: The appellant company caused certain goods to be brought by sea to Mombasa. It produced to the Commissioner of Customs and Excise what purported to be an import licence issued by the Department of Trade and Supplies. Before the goods had been released, the Commissioner seized them, in exercise of the powers conferred on him by s. 158 of the East African Customs Management Act 1952. In compliance with section 159 (1) of that Act he then served on the company a notice of seizure, in which he gave as the reason for the seizure an allegation that the import licence was forged, and he stated that the seizure was "in terms of s. 155A (*g*) of the Act". The company wrote to the Commissioner in accordance with s. 159 (4) claiming the goods and the Commissioner then gave notice to the company under s. 161 (1), requiring the company to institute proceedings for the recovery of them. The company did so, but its suit was dismissed with costs. It is against that decision that this appeal is brought and the Commissioner has cross-appealed.

In his judgment, the learned judge found as a fact that the purported licence had been forged. The licence itself consists of endorsements on an indent for goods. It was conceded that rubber stamps and a serial number had been impressed in the licensing office, but the learned judge found that the signature to the licence had been forged. There has been no appeal against that finding, which is therefore conclusive so far as this appeal is concerned.

Paragraph (*g*) of s. 155A reads as follows:

“any goods in respect of which, in any matter relating to the Customs, any entry, declaration, certificate, application or other document, answer, statement or representation, which is knowingly false or knowingly incorrect in any particular has been delivered, made or produced”.

The learned judge analysed this paragraph and decided that what it means is

> "that the document or representation in question should be known to be false or incorrect to the person who delivers it or who makes it or who produces it".

With that interpretation, I would respectfully agree.

It is not in dispute that the forged licence was presented to the Commissioner by the company, so that the question which the learned judge had to decide was whether it had been presented "knowingly". There was no evidence to show guilty knowledge, but the learned judge inferred it. He said:

> "Mr. Chandaria's evidence seems to suggest that if the licence was forged it must have been forged by somebody in the Import Licensing Division. I do not see why anybody in that office should forge a licence unless this was done for money or other inducement in which event the company would know and knowledge is all that the law requires."

It was against this conclusion that the appeal was directed. Sir William Lindsay, who appeared for the company, submitted that it was wrong in law to impute guilty knowledge to the company, when there was no evidence whatsoever to link the company or any of its officers with the forgery. The only relevant evidence, that of Mr Chandaria, the manager of the company, and of Mr Nagda, a clerk in its employ, was to the effect that a licence was applied for in the usual way, from the proper authority, and that it was received by post. Mr Chandaria said that the licence appeared to be genuine and he believed it to be genuine. Sir William submitted that it is not impossible for an entirely innocent person to find himself in possession of a forged licence, as, for example, if forgery has been procured by someone with a similar name.

In my opinion, the decisive factor is the finding that the signature on the licence was forged. This excludes any possibility that the licence was issued in error by the proper authority. The indent for the goods was admittedly submitted to the licensing authority by the company, and it was returned with endorsements to the company. It is inconceivable that a licence would have been forged except at the instance of someone who would benefit by it, and that could only be the company. The possibility that someone with a similar name might have applied for a licence at the same time and attempted to procure a forgery and that the forged licence was by mistake issued to the company is so remote that it would, in my opinion, be quite unrealistic to consider it, in the absence of some evidence, however slight, to suggest it. In my view, the conclusion that some officer or servant of the company was a party to the forgery is irresistible and that is enough to saddle the company with knowledge of it.

Sir William also suggested that if some officer in the licensing office had forged licences for other applicants (and there was evidence of other forgeries), he might have forged the company's licence unsolicited, so as to avoid an allegation of and investigation into discrimination in the grant and refusal of licences but, with respect, that suggestion seems to me far-fetched.

In my view, even bearing in mind the gravity of the implication, the learned judge was fully justified in his conclusion and I would dismiss the appeal.

The cross-appeal, as argued, would not have affected the outcome of these proceedings but Mr. Lutta, who appeared for the Commissioner, argued it because he wished what he submitted was a misdirection in law to be corrected. In his notice of seizure, the Commissioner had relied solely on the allegation that the licence was forged and had expressly referred to s. 155A, para. (*g*).

In his Written Statement of Defence, however, he relied mainly on a different allegation, that the goods were restricted goods imported without a valid licence contrary to s. 155A, para. (*b*), advancing his original ground only in the alternative. The learned judge held that it was not open to the Commissioner to rely in the suit on grounds not given in the notice of seizure. He said:

> "I think the whole basis of the proceedings is the notice of seizure specifying reasons for such seizure. The scope of the proceedings is limited by the scope of the notice. The Commissioner cannot in my opinion increase the scope of the proceedings by simply mentioning in his written statement grounds of forfeiture other than those specified in the notice of seizure."

Later in his judgment, he referred to the time limit of one month within which notice of seizure has to be given, and said:

> "In my opinion, an officer giving a notice is not estopped from correcting or amending it within one month of seizure",

and went on to say that an amendment after "the period of limitation" would be of no effect.

Mr Lutta relied mainly on the provisions of s. 161 (4) of the Act, which reads:

> "Where any proceedings have been instituted in accordance with the provisions of this section, then –
>
> (*a*) if the Court is satisfied that such thing was liable to forfeiture under this Act, such thing shall be condemned; . . ."

He submitted that the reasons given in the notice of seizure cannot fetter the power, and indeed the duty, of the court to condemn goods liable to forfeiture under the Act.

Mr Lutta also referred to the decision of this Court in *T. M. Bell v. Commissioner of Income Tax*, [1960] E.A. 224. That was an income tax case in which a taxpayer, on appeal to a judge, sought to rely on grounds other than those specified in his notice of objection to the Commissioner. In his judgment, Sir Kenneth O'Connor, P. observed:

> "No doubt, it is convenient that the Commissioner should be given notice in the notice of objection of the precise grounds upon which the taxpayer objects to the assessment. But I am unable to find any provision which says that when the matter comes to a judge, the taxpayer is precluded from relying on any additional grounds, of which he may have been unaware when he put in his notice of objection or which his legal advisers may since have advised him that he has . . . I can find no words limiting this right of appeal to the grounds taken by the taxpayer in his notice of objection to the Commissioner and I should require very clear words before I would agree that the right of appeal which is conferred by the Ordinance on a taxpayer should be so restricted, or that the power of the court to do justice and to determine the real issues between the parties should be so curtailed, certainly as regards points of law where there were no disputed facts."

That case is obviously distinguishable, but Mr Lutta argued that the underlying principle is the same and I think there is considerable merit in this argument.

It is true that the notice of seizure is one of the early stages in the train of events and that the notice of seizure must include the reasons for the seizure but it is not the notice of seizure that institutes the proceedings – they are

instituted in the usual way by a plaint. Once a plaint is issued by a claimant, the Commissioner is entitled to resist it on any proper grounds, whether or not they were included in the notice of seizure. Of course, if the notice of seizure has operated to mislead the claimant, the court may think fit to allow the claimant to amend his plaint, may grant any necessary adjournment and may penalise the Commissioner in costs. But I can find nothing in the Act to say that the pleadings must be restricted to the issue raised in the notice of seizure, nor do I think such a view can be supported on general principles. I would only add, in relation to Mr Lutta's argument on s. 161 (4), that in my opinion the court should determine the suit on the issues raised by the pleadings and not go outside them. For the reasons I have given, I think with respect that the learned judge was wrong in holding that the Commissioner could not go outside the notice of seizure in defending the suit and I would allow the cross-appeal.

To sum up: I would dismiss this appeal and I would allow the cross-appeal to the extent I have mentioned. Mr Lutta did not specifically ask for costs on either the appeal or cross-appeal, so I would not at this stage make an order for costs without first hearing the parties.

Sir Charles Newbold P: I have had the advantage of reading in draft the judgment of Spry, J.A. and I agree with it.

On the appeal itself, all that I would add is that where an importer presents a forged licence which purports to license him to import certain goods, then there arises a very strong inference that the licence is false to his knowledge. There may be certain circumstances in which he can disprove that inference. The mere fact, however, that someone in the licensing office has collaborated in the forgery is not sufficient to disprove that inference and enable the importer to say that he made application to the licensing office and received back a licence which was not obviously false and in those circumstances knowledge of the falsity should not be imputed to him.

On the cross-appeal, I confess that I was originally against Mr Lutta's submission and it is only with considerable reluctance that I am persuaded by him to accept his submission. In my view the courts should be slow indeed to accord to a government officer any right to interfere with the liberty or property of an individual unless it is manifest that such a right is given by statute or the common law, and even then such interference should only be permitted in accordance with the requirements of the statute or the common law conferring such a right. In this case a right of seizure of the property of an individual is conferred upon a government officer but the procedure for exercising that right is also set out. That procedure requires, under s. 159 (1) of the East African Customs Management Act 1952, that the officer shall "within one month of such seizure, give notice in writing of such seizure and of the reasons therefor to the owner" of the property. Had those words stood alone I do not think I should have been persuaded that a reason different from that given in writing at the time of the seizure could be used to justify the seizure. But they do not stand alone: they apply only when the seizure is effected in the absence of the owner. If the seizure is effected in the presence of the owner no reason need be given; and it has been held that if a reason is given at the time a different reason may subsequently be used in justification. I can see no distinction in essence between a seizure in the presence of the owner and one in his absence. The notice required when the seizure is in his absence is obviously intended to inform him of the fact of seizure. Once this is done I see no good ground for saying that in the one case no reason need be given and any reason may be relied on even if a different one has been given, while in the other case a reason must be given and only that reason will suffice to justify seizure. There are other

provisions in the Act, such as s. 161 (4) to which Mr Lutta referred, which seem to imply a duty on the court to determine the liability to forfeiture irrespective of any reason given for seizure. It would certainly seem absurd to say that the courts must order the release of the goods, for instance narcotics, merely because the wrong reason for seizure was originally given. For these reasons I consider that the words I have quoted from s. 159 (1) are directory and not mandatory, and a failure to comply strictly with them does not vitiate the seizure. Reluctantly, therefore, and with very real regret, I find myself unable to agree with Chanan Singh, J. that the scope of the proceedings is limited by the scope of the notice.

Accordingly, I agree with Spry, J.A. that the appeal should be dismissed and that the cross-appeal should be allowed to the extent he has set out; and it is so ordered. For the reasons he has mentioned we shall now hear submissions on the question of costs.

Law JA: concurred.

After hearing argument, the court awarded costs of the appeal to the respondent and made no order as to costs on the cross-appeal.

Appeal dismissed with costs. Cross-appeal allowed, with no order as to costs.

For the appellant:
Sir William Lindsay
Hamilton, Harrison and Mathews, Nairobi

For the respondent:
BCW Lutta (Counsel to the East African Community) and *DM Wekesa*
Counsel for the East African Community

Dewshi v Kuldip's Touring Co
[1969] 1 EA 189 (CAE)

Division:	Court of Appeal for East Africa at Mombasa
Date of judgment:	22 November 1968
Case Number:	29/1968 (184/68)
Before:	Sir Clement de Lestang Ag P, Duffus Ag V-P and Spry JA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya at Mombasa – Mosdell, J

[1] Negligence – Res ipsa loquitur – Car suddenly leaving road – Passengers injured – Defence of inevitable accident by driver – Burst tyre – Duty on owner to make visual inspection of tyres.

[2] Negligence – Inevitable accident – Presumption of negligence not rebutted – Res ipsa loquitur.

Editor's Summary

The appellants were passengers in a car owned by the respondent company and driven by the respondent's servant. The car was under hire to take the appellants and another from Mombasa to Dodoma and back again and while travelling from Dodoma to Mombasa, the car suddenly left the road, struck a ditch, turned over two or three times and came to rest against a tree. As a result of the accident, both appellants were injured and claimed damages against the respondent. The trial judge dismissed the suits and upheld the defence of inevitable accident caused by a burst tyre on the near side rear wheel of the vehicle. Evidence was given that on the outward journey to Dodoma there was a puncture in one of the tyres and the driver had to purchase a new tube

and tyre and that again, on the return journey, some time before the accident, the offside front wheel sustained a puncture and the tyre had to be repaired. The appellants founded their claim on the doctrine of res ipsa loquitur and counsel for the appellants contended that the onus of proving inevitable accident, which was on the respondents, had not been discharged, (i) because it was not proved that the burst tyre on the near side rear wheel had preceded the accident, and (ii) that even if the burst tyre was the cause of the accident, it had not been shown that the burst could not have been avoided by proper inspection and maintenance of the tyre.

Held –

(i) although the damage to the tyre might have been caused after the car left the road, there was no evidence to support this view;

(ii) the trial judge's findings in regard to the burst tyre being the cause of the accident remained unaltered;

(iii) in the absence of any evidence as to an inspection of the tyres either before the car was hired out or before it left Dodoma and in the absence of any evidence as to the state of the road as a possible cause of the puncture, the presumption of negligence had not been rebutted.

Appeal allowed with costs.

Cases referred to in judgment:

(1) *The Schwan v. The Albano*, [1892] P. 419.

(2) *Barkway v. South Wales Transport Co. Ltd*., [1948] 2 All E.R. 460.

(3) *Embu Public Road Services Ltd. v. Riimi*, [1968] E.A. 22.

(4) *Msuri Muhhiddin v. Nazzor bin Seif*, [1960] E.A. 201.

November 22, 1968. The following considered judgments were read:

Judgment

Sir Clement De Lestang Ag P: These are consolidated appeals in which the appellants are different, the appellant in C.A. 29/1968 being Mrs Laxmiben Jayantilal Dewshi, and in C.A. 30/1968, the same lady as mother and next friend of her minor daughter. The respondents are the same in both cases. For the sake of convenience, I shall refer to both appellants as the appellants.

The appellants' husband and father respectively hired a car from the second respondent to take him and the appellants from Mombasa to Dodoma for the funeral of his wife's father and back to Mombasa. The car was driven by the first respondent and servant of the second respondent. On the way to Dodoma when approaching Tanga, there was either a puncture or a blow-out, it is not clear which, in the rear offside wheel. What is clear is that both tube and tyre of that wheel had a cut which could not be repaired quickly and so the first respondent had to purchase a new tube and tyre at Tanga. On the way back to Mombasa from Dodoma a few days later, the offside front wheel sustained a puncture near a place called Handeni. This puncture was repaired at Handeni and the car proceeded on its journey to Tanga. At Tanga the passengers and the driver rested and took supper. They then left on the final stage of the journey to

Mombasa but the car had only travelled some forty miles and was approaching Lunga Lunga when it suddenly left the road, struck a ditch, turned over two or three times and came to rest against a tree. In the accident the appellants were injured and brought separate suits for damages against both respondents on the ground of negligence of the first respondent and founding their claim *inter alia* on the doctrine of res ipsa loquitur. By their defence, both respondents denied negligence. The first respondent also pleaded

volenti non fit injuria on the ground that the appellants' husband and father had insisted on his continuing to drive in spite of his request to be allowed to rest at Tanga. The second respondent also pleaded that the first respondent in the circumstances was the servant not of the second respondent, but of the appellants' husband and father who had hired the car. At the trial, all these defences were abandoned and the only defence, namely that of inevitable accident caused by a tyre burst on the near side rear wheel, was raised for the first time. It is remarkable that until the trial had begun such a defence was not disclosed and the appellants were totally unaware that it would be raised. Nevertheless, nothing turns on this in this appeal because no objection was taken and it is not a ground of appeal. This defence found favour with the learned judge who held that the respondents were entitled, having regard to the wear on the tread, to have the tyres on the car and that the burst was the cause of the accident. He accordingly dismissed the suits. Hence these appeals.

For the appellants, Mr Wilkinson contended that the onus of proving inevitable accident, which it is conceded was on the respondents, was not discharged for two reasons: first, because it was not proved that the burst preceded the accident instead of being a result of it; second, because even if the burst tyre was the cause of the accident, the respondents failed to establish that the burst could not have been avoided by proper inspection and maintenance of the tyre.

As regards the first contention, Mr Wilkinson relies, naturally enough, on the belated disclosure of the defence of inevitable accident, as well as on the evidence of the first respondent who at first stated that the accident was due to a puncture in the nearside front wheel and later altered his evidence to say that it was caused by a burst in the nearside back tyre. Both this witness and the appellants' husband and father said they did not hear the noise of the blow-out immediately prior to the accident. Mr Wilkinson also criticised the evidence of a Mr Ross who gave expert evidence and expressed the view that the accident was caused by a burst tyre. He based his view on inspections of the car which he made during the first three days after the accident when the car had been brought to Mombasa and again on some later date, and found a distorted drum and bent driving shaft to the rear nearside axle and damage to the rear nearside wheel.

There was thus a conflict of evidence on whether or not the blow-out preceded the accident, and the learned judge accepting the evidence of Mr Ross and having regard to the probabilities, found in favour of the respondents on this point. While it is possible that the damage to the car might have been caused after it had left the road, such as by hitting some hard object in the ditch or a tree, there is no evidence apart from the driver's evidence of hitting a tree to support this view. In these circumstances, although I do not find Mr Ross's evidence impressive, I am not prepared to say that the learned judge was wrong in his conclusion on the blow-out.

As regards the appellants' second contention, Mr Wilkinson referred to several English decisions and to *Embu Public Road Services v. Riimi*, [1968] E.A. 22, and submitted that the blow-out was a neutral event which was equally consistent with negligence or no negligence on the part of the respondents. From there he argued that in the absence of any evidence regarding the type of tyre used and the care and maintenance to which it was subjected, the respondents failed to prove that the accident was inevitable. I propose to refer to one English decision only in which inevitable accident is defined, and to the decision of this court in which a previous decision of this court, namely *Msuri Muhhiddin v. Nazzor bin Seif*, [1960] E.A. 201, in which most of the authorities were considered, was followed. In *The Schwan v. The Albano*, [1892] P. 419, at page 429 Lord Esher said:

> "What is the proper definition of inevitable accident? To my mind these cases show clearly what is the proper definition of inevitable accident as distinguished from mere negligence – that is a mere want of reasonable care and skill. In my opinion, a person relying on inevitable accident must show that something happened over which he had no control, and the effect of which could not have been avoided by the greatest care and skill. That seems to me to be the very distinction which was taken, and was meant to be taken between the case of inevitable accident and a mere want of reasonable care and skill."

In the *Embu Public Road Services* case, Sir Charles Newbold, P., after referring to the *Msuri* case, said at page 25:

> "As I understand the law as set out by those two judgments of this court, where the circumstances of the accident give rise to the inference of negligence then the defendant, in order to escape liability, has to show, in the words of Sir Alistair Forbes, 'that there was a probable cause of the accident which does not connote negligence' or in the words which I have previously used 'that the explanation for the accident was consistent only with an absence of negligence'."

There is in the present case, a finding by the learned judge which, as I have already said, I am not prepared to interfere with, that the immediate cause of the accident was a burst tyre, and the question for decision is therefore whether the blow-out was due to the negligence of the respondents or more probably to an absence of negligence. In the present case, the only thing known about this tyre is that after the accident the tread was fifty per cent worn. There is no evidence that it was examined before the accident and it is significant that another tyre on the car sustained a puncture and yet another one had a blow-out or near blow-out. Mr Wilkinson relies strongly on a passage in the judgment of Buckhill, *L.J. in Barkway v. South Wales Transport Co.*, [1948] 2 All E.R. 460, where he said at page 465:

> "I think that the defendants, in order to avoid liability, must prove to the satisfaction of the court that they took all reasonable steps to ascertain that the tyre was fit for use on February 27, and this I think on the evidence they failed to do. It may have been fit or it may not have been fit. The mere external examination of a tyre which had run 21,750 miles since August 1, 1942, part of which was done on bad roads driven by drivers who had had no instructions to report an unusual and heavy blow to the tyre, and without any examination of its internal surface during the whole of that time, seems to me to leave the defendants with the burden undischarged of satisfying the court that they had taken all reasonable steps to avoid this accident."

He argued that, as in the present case there was no evidence at all that the tyre had been examined and found to be in a proper condition before the car was hired nor how it was cared for and maintained, the presumption of negligence on the respondents had not been rebutted.

Mr Mackie-Robertson for the respondents argued that, in conditions applying in this country, there was no duty on the respondents to conduct a routine inspection of the tyre for hidden weaknesses as was laid down in Barkway's case and that the learned judge having found that the respondents were entitled to use the tyre in the condition in which it was, this court ought not to interfere with his decision. Although a similar statement by the learned trial judge in *Msuri's* case was not disapproved by this court on appeal, and while I would agree that the duty imposed on the owner of an omnibus must be higher than

that placed on the hirer of a car, nevertheless there is clearly a duty imposed on the latter to make at least a visual inspection of the treads and walls of the hired car's tyres. There is no evidence of any such inspection in the present case either before the car was hired out or before it left Dodoma on its way back to Mombasa, in spite of the fact that one of the tyres had had a puncture and another a near blow-out and was badly cut. There is no evidence of the state of the road at the place of the accident and in particular whether there were sharp stones on the road which could have caused a blow-out. To make things worse, the tyre was not even produced in evidence, having been destroyed by Mr Ross after apparently only inspecting the treads. In these circumstances, I respectfully regret being unable to agree with the learned judge that the presumption of negligence was rebutted in this case. I would accordingly allow these appeals and set aside the decision of the learned judge in both suits, substitute orders that the respondents are liable in damages to the appellants and remit the proceedings to the court below to assess the damages to be awarded. I would allow the costs of these appeals to the appellants with a certificate for two advocates and also the costs in the court below to date. The costs of assessing the damages will be in the discretion of the court below. As the other members of the court agree, it is so ordered.

Duffus Ag V-P: I entirely agree with the judgment of de Lestang, Acting President.

I would just shortly comment on the differences between this case and the case of *Msuri Muhhiddin v. Nazzor Bin Seif El Kassaby and another*, [1960] E.A. 201. In the Msuri case the learned trial judge found on the evidence that the tyres of the bus were good tyres with the tread still on them and that the second respondent, the driver of the bus, had no reason to believe that they were not safe and that he had done his duty of safety to the public by satisfying himself that they were good tyres with the tread still on them. The trial judge also found – I quote at page 204 of the judgment of the Appeal Court:

> ". . . There is evidence that bursts can be caused by sharp things on the road. It is quite probable that the rough solid stone under the road near where the tyres burst was the immediate cause."

There was also a finding that the driver of the bus was not driving at an excessive speed having regard to the conditions and user of the road, and this court held that the respondents had discharged the onus thrown on them by the application of the principle of res ipsa loquitur.

The facts in this case are quite different. The learned trial judge on this question of the tyre found:

> "It could not be said to have been negligence on the part of the owner to have allowed the car to be hired with this tyre on the near side rear wheel."

With great respect to the learned judge there was not sufficient evidence in this case to justify this finding. As the learned President points out the only evidence in this case about the condition of the tyre is that of the expert Mr Ross to the effect that the side wall of the tyre was "fractured" or "burst" and that the tread was about fifty per cent worn. Apart from this there was no other evidence about the condition of the tyre. It may have been an old tyre retreaded, or a tyre with a patched or repaired or otherwise defective side wall. For some reason the tyre was destroyed and the appellant never given the opportunity to inspect the tyre. Then there was no evidence to show why the burst occurred to the side wall: according to Mr Ross it may have been due to a violent impact or to a flaw in the tyre or to overheating or coming in contact with a stone or

tree. The driver of the car, the second respondent, did not even suggest a reason.

There was also no evidence at all to show that either the owner of the hired car or the driver ever inspected or even looked at the tyres to see if they were in good condition. I entirely agree with de Lestang, Ag. P., that there is clearly a duty imposed on the owner or operator of a hired car to at least make a visual inspection of the treads and walls of the tyres of the car to ensure that they were fit for use.

I therefore agree that the presumption of negligence was not rebutted, in this case, and that the appeal be allowed in accordance with the order set out in the judgment of De Lestang, Ag. P.

Spry JA: concurred.

Appeal allowed with costs.

For the appellants:
PJ Wilkinson, QC and *Sadiq Ghalia*
S Ghalia, Mombasa

For the respondent:
JA Mackie-Robertson, QC and *CR Doshi*
Patel and Thakkar, Mombasa

Shah Karamshi Panachand & Co Ltd v Velji and another
[1969] 1 EA 194 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	28 November 1968
Case Number:	502/1967 (17/69)
Before:	Madan J
Sourced by:	LawAfrica

[1] Land registration – Lease – Surrender of – Manner of effecting – Whether registered instrument required – Registration of Titles Act (*Cap.* 281), *s.* 43.

[2] Landlord and Tenant – Surrender – Tenant handing over to limited company – Monthly tenancy created.

Editor's Summary

The plaintiff let premises to the first defendant on a lease for ten years from 1957 registered under the Registration of Titles Act (Cap. 281). In 1963 the first defendant converted his business into a limited liability company, the second defendant, which company to the knowledge of the plaintiff thereafter

carried on business in the demised premises and paid rent to the plaintiff until the end of 1966. The plaintiff issued receipts for rent in the name of the second defendant, and demanded site value tax from the second defendant. The plaintiff sued for possession of the premises against the first defendant on the ground that he continued unlawfully in possession after the expiry of the lease by effluxion of time and against the second defendant on the ground that it was a trespasser. The plaintiff contended that surrender of a registered lease could only be effected by a registered instrument.

Held –

(i) although it was not effected by a registered instrument a surrender took place in 1963 which the plaintiff could have notified to the registrar of titles under s. 43 of the Registration of Titles Act (Cap. 281) upon which the first defendant's title would have been erased from the register;

(ii) The second defendant was therefore a monthly tenant of the premises.

Suit dismissed.

No cases referred to in judgment

Judgment

Madan J: The plaintiff is the owner of the suit premises the title to which is held under the Registration of Titles Act (Cap. 281), which were let to the first defendant Velji under a duly registered lease for the term of ten years from January 1, 1957.

The landlord is seeking an order for the recovery of possession of the premises against Velji on the ground that he continues in unlawful occupation after the expiry of the lease by effluxion of time on January 1, 1967; against the second defendant (hereafter called the company), on the ground that there is no privity between it and the landlord and it was introduced into the premises by Velji by unilateral act; it is also in unlawful occupation of the premises and is a trespasser therein.

There is no challenge really about the facts which are that Velji has not carried on business in the premises since March 31, 1963. On April 1, 1963 he converted his personal firm's business into a limited liability company in the name of the company who, without any objection from the landlord which occupies the adjoining shop in the building, has been carrying on business under its own name with a sign board and a plate outside bearing its name and showing its registered office is situated on the premises. The landlord never protested against the company carrying on business on the premises and received payments of rent from the company uninterruptedly from April 1, 1963 until December 31, 1966, although after that date the landlord refused to accept further payments of rent. The landlord credited the rent in its books of account and issued receipts for the same in the name of the company. The landlord never asked Velji to pay the rent or the arrears of the site value tax payable by him under the lease which the company also paid on a demand made to it direct by the landlord who also addressed the correspondence to the company relating to tenancy matters and the demands for the rent when they were made. In particular the landlord addressed the following letter to the company on November 5, 1966:

> "We refer to our lease agreement for the premises occupied by you and in terms of this agreement, we have to request you to vacate the premises occupied by you and arrange to give us the possession of vacant premises on 31st December, 1966."

The defendants say that the lease did not expire by effluxion of time. It was either determined or was surrendered or it came to an end by operation of law on March 31, 1963. Also, as a result of an agreement made between the parties on or about that day Velji surrendered possession of the premises to the landlord who took over virtual possession thereof and immediately thereafter, under a new relationship of landlord and tenant arising out of the course of conduct between the parties which determined Velji's lease and released him therefrom, the landlord let the premises to the company as monthly tenant from April 1, 1963, from which date, pursuant to the aforesaid agreement, the company has been in occupation and paying the rent for the premises which it occupies with the consent, knowledge and agreement of the landlord, who is estopped from denying the existence of the company's monthly tenancy.

Now for the evidence. In my opinion it fails to prove that an agreement such as is contended for on behalf of the defendants was expressly reached between the parties although it can be irresistibly inferred from their conduct.

There is also no substance in my opinion in the contention now put forward on behalf of the landlord that the company paid the rent as Velji's agent or that the landlord received it on his behalf. The landlord's own receipts admittedly do not show this, and, also after April 1, 1963 the landlord did not have anything to do with Velji. From that date onwards the landlord was knowingly clearly dealing exclusively with the company as the tenant in occupation of the premises. Counsel for the landlord I think realised the force of the evidence, for he framed his argument carefully when he said the payment of rent by the company could well be on behalf of Velji who is a director of the company and was the registered lessee of the premises. The landlord's own letter dated November 5, the other correspondence exchanged by it direct with the company, the demand for payment of arrears of the site value tax and rent for nearly four years by the company and, finally, the demand for vacant possession of the premises solely from the company, it all irretrievably casts adrift the argument that there is no privity between the landlord and the company. That by itself should be enough to estop the landlord from seeking possession from Velji and oblige it first to determine the company's tenancy which has not been done before seeking possession from the company.

What then stands in the way of dismissal of the landlord's suit? According to the argument for the landlord, the lease given to Velji was still subsisting when the company is claimed to have gone into possession of the premises as monthly tenant. As there was no surrender of the lease by a registered instrument which is the only manner of effecting it by the parties mutually, the landlord was incapable of granting a new tenancy to the company as the premises were still vested in Velji. Until Velji's interest was extinguished in a legally recognised manner there could not be a relationship of landlord and tenant with the company. The defendants however contend that there was a surrender of Velji's lease by operation of law which should perhaps be more correctly stated as a surrender by act and operation of law which released Velji and established the company as monthly tenant.

The question of surrender is a difficult one. What is the situation here? When Velji unquestionably abandoned and ceased to occupy the premises as lessee the company, subject to resumption of possession by the landlord in manner hereafter stated, immediately went into possession of them, and thereafter in every manner it acted and was treated and accepted as tenant by the landlord. It was possible for this to happen only if the landlord resumed possession of the premises symbolically sufficient in law between the time Velji ceased to occupy and the company went into possession of them even though the landlord did not take over actual possession; otherwise the landlord could not have accepted and treated the company as tenant. There was a surrender of Velji's lease by operation of law when the landlord thus went into possession, enabling it to create the new monthly tenancy in favour of the company. A surrender by operation of law does not depend upon the intention of the parties, and the law must step in to cure any informality in the surrender in order to prevent a nonsense being made of an otherwise sensible situation. It would be a bad law that refused to give effect to a surrender in the particular circumstances of this case for it would fail to do substantial justice between the parties, demolish the reality of the situation and substitute therefor an unimaginative abstraction.

Once the surrender took place, even though it was not effected by a registered instrument, under the provisions of s. 43 of the Act, the landlord could notify the registrar of titles that Velji's lease had been determined. There was ample evidence to which Velji himself was a party to enable the landlord effectively to have Velji's interest as lessee erased from the register. For the same reason,

as the land involved is registered land, the sanctity of the register would not suffer, which is a further argument advanced on behalf of the landlord, and also, because there was no surrender effected by a registered instrument, the defendants cannot claim estoppel against statute. But this is really an irrelevant argument. Neither Velji nor the company are seeking to attack the landlord's title or challenge the sanctity of the register. There can be no rape without an assault without consent. In so far as Velji is concerned, by his own act the lease became a dead letter. The company claims to be no more than a mere monthly tenant. Finally the landlord is also not a virtuous virgin. It willingly accepted the company's monetary advances in the shape of arrears of the site value tax and rent for nearly four years.

For these reasons this suit must fail with costs.

Case dismissed.

For the plaintiff:
JM Nazareth, QC and *GS Sandhu*
GS Sandhu & Co, Nairobi

For the defendant:
JJ Patel
JJ Patel & Co, Nairobi

Shah v Republic
[1969] 1 EA 197 (HCK)

Division:	High Court of Kenya at Mombasa
Date of judgment:	7 May 1968
Case Number:	110/1967 (135/68)
Before:	Mosdell J
Sourced by:	LawAfrica

[1] Criminal Practice and Procedure – Charge-Duplicity – Causing death by driving a motor vehicle at a speed or in a manner dangerous to the public – Whether accused in doubt as to the offence of which he was convicted – Traffic Act, s. 46 (*Cap.* 403) (*K.*).

Editor's Summary

The appellant was convicted on three counts under ss. 46 and 73 (1) of the Traffic Act, in that he caused death by driving in a manner dangerous to the public on counts 1 and 2; and failing to stop on count 3. The grounds of appeal were (*a*) that the charges on counts 1, 2 and 3 were bad for duplicity and (*b*) that the conviction was against the weight of the evidence. Counts 1 and 2 were charged under s. 46 of the

Act which reads as follows: “Any person who causes the death of another by driving a motor vehicle on a road recklessly or at a speed or in a manner which is dangerous to the public . . . shall be guilty of an offence . . .” The learned judge, in reviewing the authorities, concluded that, though there might be duplicity in such a charge, if there was no failure of justice, the conviction might stand on appeal. There was no failure of justice if the appellant knew what case he had to answer. On the facts of the case, the prosecution sought to show that, just before car registration number KHD 229 which one of the two deceased was driving, and in which the other deceased was a passenger, ran off the road, it was overtaken by car registration number KJB 574 driven by the appellant and that the appellant endeavoured to push car KHD 229 off the road. There were discrepancies in the prosecution case as to what part of KJB 574 struck what part of KHD 229 and how many times the cars collided. The court found as a fact that there was plenty of room for the appellant to have given KHD 229 a wide berth as he overtook it and

that the suggestion that the driver of KHD 229 did not pull over or slow down to enable the appellant to pass did not assist the appellant's case.

Held –

(i) the magistrate had told the appellant on what ground he was being convicted on each count;

(ii) there was therefore no miscarriage of justice;

(iii) the appellant "crowded" KHD 229 causing it to veer off the road;

(iv) the deceased driver may well have been contributorily negligent, but that is no defence to a criminal charge;

(v) the appellant was guilty as charged on all three counts.

Appeal dismissed.

Cases referred to in judgment:

(1) *Cherere s/o Gukuli v. R.* (1955), 22 E.A.C.A. 478.

(2) *R. E. W. Pope v. R.*, [1960] E.A. 132.

(3) *R. v. Odda Tore and Guyo Halake* (1934), 1 E.A.C.A. 114.

(4) *Laban v. Koti*, [1962] E.A. 439.

(5) *Labhshanker Harjiwan Bhatt v. R.*, [1960] E.A. 654.

(6) *R. v. Clow*, [1963] 2 All E.R. 216.

Judgment

Mosdell J: This is an appeal from three convictions had in the court of the resident magistrate, Mombasa, under the Road Traffic Act (Cap. 403). The appellant was on July 27, 1967 convicted on each of two counts for an offence contrary to s. 46 and on a third count for an offence stated to be contrary to s. 73 (1). The particulars of offence in the three counts were laid (as amended by the magistrate) as follows:

> "Count 1:
>
> Bipin Harakchand Shah: On 26th day of December, 1966 at Shaurimoyo in Kilifi District of the Coast Province, drove a motor car No. KJB 574 on main Malindi-Mombasa road at a speed or in a manner which was dangerous to the public having regard to all the circumstances of the case and thereby caused the death of Suryakant Patel.
>
> Count 2:
>
> Bipin Harakchand Shah: On 26th day of December, 1966 at Shaurimoyo in Kilifi District of the Coast Province, drove a motor car Reg. No. KJB 574 on main Malindi-Mombasa road at a speed or in a manner which was dangerous to the public having regard to all the circumstances of the case and thereby caused the death of V. S. Patel.
>
> Count 3:
>
> Bipin Harakchand Shah: On 26th day of December, 1966 at Shaurimoyo in Kilifi District of the Coast

Province, being the driver of motor car No. KJB 574 and knowing that the said motor car had been involved in the accident with motor car No. KHD 229, failed to stop and report."

The appellant was convicted of causing the deaths of Suryakant Patel (Count 1) and of Viharidas Patel (Count 2) by dangerous driving of vehicle registration number KJB 574 and of failing to stop after the accident (Count 3). The appellant was on the same day sentenced to a fine of Shs. 3000/- or six months' imprisonment in default of each of counts 1 and 2 the imprisonment in default to run concurrently and to a fine of Shs. 500/- or one month's imprisonment in default on count 3, the imprisonment in default on count 3 to run

consecutively to the imprisonment on counts 1 and 2. The appellant was also disqualified from holding or obtaining a driving licence for two years. The total fines, viz. Shs. 6500/-, were paid by the appellant on July 28, 1967.

Mr Georgiadis, who appeared for the appellant at the hearing of the appeal, stated that although there were nine grounds of appeal in the Memorandum of Appeal there were in fact really only three grounds, viz.: (1) that counts 1, 2 and 3 were bad for duplicity; (2) that the findings of the magistrate were against the weight of evidence; and (3) that the sentence was manifestly excessive. Mr Georgiadis abandoned the appeal against sentence.

I deal with the matter of duplicity first. The magistrate, though conceding that counts 1, 2 and 3 were duplex, nevertheless was of the opinion that the appellant was in no doubt as to the case he had to answer and he was in no way prejudiced in his defence by reason of the duplicity. He convicted the appellant of causing death by driving in a manner dangerous to the public on counts 1 and 2 and of failing to stop on count 3 so that the appellant could have been in no doubt as to the offences of which he had been convicted.

It is to be observed that the particulars of offence in counts 1 and 2, which appear to have been amended by the magistrate at the inception of the trial on May 3, 1967 (as drafted by the prosecutor they charged causing death by driving only in a dangerous manner), are disjunctive in form. The appellant was charged with causing death by driving "at a speed or in a manner" which was dangerous. The particulars of offence in count 3 are conjunctive, however. The appellant was charged with failing "to stop *and* report". The burden of Mr Georgiadis' argument on duplicity appeared to relate only to counts 1 and 2 and indeed, as the authorities show, the conjunctive rather than disjunctive nature of the particulars in count 3 would appear to render count 3 good so far as duplicity is concerned. Section 46 of the Traffic Act, Cap. 403, under which the appellant was charged in counts 1 and 2 in the instant appeal, reads as follows:

> "Any person who causes the death of another by driving a motor vehicle on a road recklessly or at a speed or in a manner which is dangerous to the public, or by leaving any vehicle on a road in such a position or manner or in such a condition as to be dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which is actually at the time or which might reasonably be expected to be on the road, shall be guilty of an offence and liable to imprisonment for a term not exceeding five years."

The authorities show that this section creates four separate offences, viz. causing the death of another by driving a motor vehicle on a road

(1) recklessly, or

(2) at a speed, or

(3) in a manner which is dangerous to the public, or

(4) by leaving a vehicle on a road in such a position or manner or in such a condition as to be dangerous to the public.

The matter of duplicity in a charge was considered and the authorities reviewed by E.A.C.A. in *Cherere s/o Gukuli v. Reginam* (1955), 22 E.A.C.A. 478, a case which was concerned with the then s. 61B (1) Penal Code. The headnote reads:

> "The appellant was charged and convicted under section 61B of the Penal Code on two counts of 'administering or being present at and consenting to the administration of an oath relating to the unlawful

society commonly known as *Mau Mau*', the trial judge finding that the 'accused

> either actually administered the oath or at least was present and played a willing part in its administration'."

Section 61B (1) aforesaid reads:

> "Any person who administers, or is present at and consents to the administration of, any oath, or engagement in the nature of an oath, relating to the unlawful society commonly known as *Mau Mau* is guilty of a felony and shall be sentenced to death."

It was held:

> "(1) Section 61B of the Penal Code charges two alternative offences.
>
> (2) Where two or more offences are charged in the alternative in one count, the count is bad for duplicity contravening section 135 (2) of the Criminal Procedure Code; the defect is not merely formal but substantial. Where an accused is so charged, it cannot be said that he is not prejudiced, because he does not know exactly with what he is charged, and if he is convicted, he does not know exactly of what he has been convicted.
>
> Appeal allowed."

In *R. E. W. Pope v. R.*, [1960] E.A. 132, the Court of Appeal for Eastern Africa held that s. 325, Penal Code creates only one offence so that a charge alleging that the appellant "with intent to defraud falsified a document, or was privy to the falsifying of that document" was not duplex and was in accordance with s. 137 (*b*) (i) Criminal Procedure Code which reads as follows:

> "The following provisions shall apply to all charges and informations, and, notwithstanding any rule of law or practice, a charge or information shall, subject to the provisions of this Code, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this Code . . .
>
> (*b*) (i) where an enactment constituting an offence states the offence to be the doing of or the omission to do any one of any different acts in the alternative, or the doing of or the omission to do any act in any one of any different capacities, or with any one of different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities or intentions, or other matters stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence."

There is the old case of *Rex v. Odda Tore and Guyo Halake* (1934), 1 E.A.C.A. 114 where it was held:

> "That, as the information consisted of one count charging the appellants with the murders of two persons, the count was bad for duplicity; but that, in the circumstances of this case, there had been no failure of justice and that the accused were not embarrassed or prejudiced; and that the convictions should stand and the appeals be dismissed."

Here, be it noted, the particulars in the information were conjunctive and not disjunctive in form. In *Cherere's* case the E.A.C.A. said this:

> "In *Odda Tore's* case this Court said: 'Unless this Court is able to say without hesitation that the accused has not been prejudiced by the duplicity there will be no other course open to it than to quash the conviction.' We think it is impossible to say, and certainly no court has so far as we are aware ever yet said, that an accused person is not prejudiced when offences

> are charged in one count in the alternative: he does not know precisely with what he is charged, nor of what offence he has been convicted. It is, indeed, very difficult to say that a breach of an elementary principle of criminal procedure has not occasioned a failure of justice."

There is, therefore, some authority from the Court of Appeal for East Africa for holding that though there is duplicity in a charge, if there has been no failure of justice, the conviction, on appeal, can stand. There are one or two relevant decisions of the High Court of Kenya acting in its appellate capacity. In *Laban Koti v. R.*, [1962] E.A. 439, a case much relied on by Mr Nagpal for the Republic:

> "The appellant was charged with and convicted of wrongfully attempting to interfere with or influence witnesses in a judicial proceeding, either before or after they had given evidence, contrary to s. 121 (1) (*f*) of the Penal Code. On appeal it was suggested that the charge might be bad for duplicity, firstly because it alleged that the appellant 'wrongfully attempted to interfere with or influence' witnesses, and secondly because it alleged that such attempt occurred 'either before or after' the witness had given evidence."

It was held:

> "(i) in deciding whether there is duplicity in a charge the test is whether a failure of justice has occurred or the accused has been prejudiced.
>
> (ii) interference may involve either a physical act, such as preventing a witness from appearing to give evidence, or it may involve an act of persuasion or dissuasion; the words which the appellant used to the witnesses were both persuasive and of an influential nature.
>
> (iii) the allegation that the appellant attempted to interfere with or influence the witnesses did not amount to duplicity, as his act involved both ingredients and s. 137 (*b*) (1) of the Criminal Procedure Code applied.
>
> (iv) the appellant was left in no doubt, from the time when the first prosecution witness gave evidence, that the alleged attempt was made before the witnesses gave evidence and his defence could not, therefore, be said to have been prejudiced in any way; accordingly there was no miscarriage or failure of justice on the ground that the charge was duplex in alleging that the attempt was made either before or after the witnesses had given their evidence."

In *Labhshanker H. Bhatt v. R.*, [1960] E.A. 654:

> "The charge against the appellant of which he was convicted alleged that the appellant 'for the purpose of, or by way of trade, or for the purpose of distribution or public exhibition had in your possession thirty-seven photographs of an obscene nature which would tend to corrupt the morals of any person into whose hands these publications are likely to fall'. The main ground of appeal was that the charge was bad for duplicity in that the offence created by s. 177 (1) (*a*) of the Penal Code was not made out by proof of mere possession but it was necessary also to allege and prove that the possession was for one or other of the purposes set out therein and accordingly the charge must specify which of the unlawful purposes the appellant was alleged to have had in contemplation.
>
> Held: the particular purpose for which the appellant had the photographs in his possession should have been averred in the charge and the averment of several purposes in the alternative made the charge bad in law and the trial a nullity.

> Appeal allowed. Conviction quashed and sentence set aside."

Maithaka s/o Gichinga v. R., [1963] E.A. 627 deals with disjunctivity and conjunctivity in a charge. In the latter case:

> "The appellant was convicted of theft and of unlawfully attempting to strike a person with a dangerous weapon with intent to resist arrest. His appeal against conviction was dismissed, the court being satisfied that there was overwhelming evidence of the appellant's guilt. There was a third count against the appellant of reckless driving and the particulars of the charge stated that the appellant drove a motor vehicle in a reckless manner and at a speed which was dangerous to the public having regard to all the circumstances of the case. The magistrate, relying on *R. v. Wilmot* (1933), 24 Cr. App. Rep. 63, acquitted the appellant of this offence on the ground that the count was bad for duplicity as the commission of two offences was alleged. Although there was no appeal by the Crown against the acquittal, the court considered the question of duplicity."

It was held:

> "(i) where separate offences are charged in the alternative, that is, disjunctively, using the word 'or', then separate offences are charged in one count which is bad for duplicity, but it is permissible to charge them conjunctively using the word 'and' if the matter relates to one single act;
>
> (ii) since the charge against the appellant had been expressed conjunctively and the particulars referred to one incident or act, namely, the appellant's driving of the motor car at the relevant time, the charge should not have been rejected for duplicity. *R. v. Clow*, [1963] W.L.R. 85 applied."

With the injection of some common sense into the matter, which the authorities seem somewhat reluctant to allow, it seems to me that the appellant was not by one iota prejudiced by the disjunctivity of the particulars of offence in counts 1 and 2. He knew what case he had to answer. He knew that he had to meet an allegation of causing two deaths by driving at a speed and in a manner dangerous to the public. The real offences were causing the deaths of two people by driving in a manner dangerous to the public by reason of one or other of two things, viz. the speed or manner of driving. How can it be stated, therefore, with any sense of reality, that he did not know what case he had to answer? It seems to me that an accused is in no worse position when the particulars of the offence are framed disjunctively than when they are framed conjunctively. Is prejudice really occasioned by the use of the word "or" but not by the use of the word "and"? Whether "or" or "and" appears in the charge an accused knows that he must be prepared to meet both limbs of the charge. Moreover in the instant appeal, the appellant knew of what, in each count, he was convicted because the magistrate enlightened him. I hold, therefore, that though counts 1 and 2 are duplex there was no miscarriage of justice – and this ground of appeal fails. As regards count 3, I reject the appeal on the ground of duplicity because the particulars of offence were expressed conjuctively and not disjunctively. This illogical distinction per se appears to render the charge non duplex. [*R. v. Clow*, [1963] 2 All E.R. 216.] There was no evidence of failing to report, however, and the magistrate convicted the appellant of failing to stop contrary to s. 73 (1) of the Traffic Act, Cap. 403.

It is now necessary to consider the submissions that the findings of fact by the magistrate were against the weight of evidence. The prosecution sought to show that just before car registration number KHD 229 (hereinafter called "KHD 229"), which Suryakant Patel was driving and in which Viharidas

Shivabhai Patel was a back seat passenger, ran off the road and overturned causing the deaths of the two Asian gentlemen just mentioned, motor vehicle registration number KJB 574 (hereinafter called "KJB 574"), driven by the appellant, overtook it at a speed of about 70 m.p.h. and in so doing KJB 574 touched the offside of KHD 229; and that the appellant was indulging in horseplay and was endeavouring, by the manner in which he drove KJB 574, to "push" KHD 229 over to the left. The appellant gave no evidence in the court below, nor did he make an unsworn statement or call any witnesses, though he had several passengers in the car at the material time. There were discrepancies in the evidence of the two prosecution eye witnesses, as well there might be in the circumstances – the accident occurred at about 9.00 p.m. on December 26, 1966 and the speed of the two vehicles, at the time of the occurrence, without doubt, was in excess of 60 m.p.h. The discrepancies concerned what portion of KJB 574 struck what part of KHD 229 and how many times KHD 229 was struck by KJB 574. KJB 574 was a Peugeot 404 Saloon and KHD 229 a Peugeot 403 Saloon. The motor vehicle examiner did not help very much. His evidence in court as to damage on KJB 574 differed from the facts given in his report. As regards the circumstances of the accident, in his judgment, the magistrate stated this:

> "13 . . . the evidence of Jayantibhai Patel and Vinoobhai Amin leaves me in no doubt (*a*) that the accused was, at the material time, driving KJB 574 at a speed and in a manner which was dangerous to the public having regard to all the circumstances of the case, including the width of the tarmac portion of the road and overall width of the road in question.
>
> 14. That the accused did not stop after the accident as testified by Jayantibhai Patel at p. 34 of the record.
>
> There is a discrepancy in the evidence of Jayantibhai Patel and Vinoobhai Amin (*a*) as to the number of times KJB 574 hit KHD 229, and (*b*) as to the part of KHD 229 where KJB 574 hit it before the collision but everything happened so suddenly that each described what he saw."

Irrespective of whether or not KJB 574 actually touched KHD 229 more than once or at all (and I hold that the magistrate was correct in holding, on the evidence, that the two cars did actually collide as the former overtook the latter), I have not the slightest doubt, like the magistrate, that when overtaking KHD 229 the appellant was driving in a manner dangerous to the public. He was driving KJB 574 far too close to KHD 229 when he overtook. The road at the scene had 10 feet of tarmac and 12 ½ feet of grass and murram on each side of the tarmac. There was plenty of room for the appellant to have given KHD 229 a wide berth as he overtook KHD 229 albeit the latter was wholly on the tarmac. Instead he "crowded" KHD 229 causing it to veer off the road. There is a suggestion in the evidence of Jayantibhai Chotabhai Patel and Vinoobhai Chunibhai Patel that Suryakant Patel the driver of KHD 229 was not willing to allow KJB 574 to pass – that he did not slow down or pull over to the left. Suryakant Patel may well have been contributorily negligent but contributory negligence is no defence to a criminal charge. I have not the slightest doubt that the appellant was driving in a manner dangerous to the public, thereby causing the deaths of two Asians, of which offences the magistrate convicted him on counts 1 and 2. I dismiss the appeals against conviction on counts 1 and 2. As regards count 3 the magistrate credited the evidence of J. C. Patel which is supported by that of Paresh Motilal Malde and held that the appellant did not stop. It would be fantasy to suppose that in the circumstances he did not know that there had been an accident to KHD 229. He made no attempt to see what had happened. Though he may

have stopped for a moment or two to enable his car to be driven to Mombasa, he did not stop in the sense required by law, viz. to "stop and if required to do so by any person having reasonable grounds for so requiring give his name and address etc." I dismiss the appeal against conviction on count 3 also. I do not propose to enhance the sentences.

Appeal dismissed.

For the appellant:
B Georgiadis and *KC Thakkar*
Patel & Thakkar, Mombasa

For the respondent:
OP Nagpal (Senior State Counsel, Kenya)
Attorney-General, Kenya

Uganda v Sebyala and others
[1969] 1 EA 204 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	20 September 1968
Case Number:	292/1968 (172/68)
Before:	Goudie J
Sourced by:	LawAfrica

[1] Criminal Law – Alibi – Defence of – Extent of burden on accused.

[2] Criminal law – Murder – Intention – Common intention – Mob – Police post attacked by mob – Policeman killed – Penal Code, s. 21 (1) (*c*) *and s.* 22 (*U.*).

Editor's Summary

On May 23, 1966 widespread disturbances took place throughout the area known as Buganda and as a result of these disturbances, in the Luwero district, meetings were held which resulted in an unruly mob marching on the Luwero Police Post. Shots were fired both by the defending policemen and by armed members of the mob. As a result of the shots fired, a policeman was killed and a further deceased, Sempa, was found to have been cut to ribbons. The court found that there was no justification for the killing of the policeman and that the killing amounted to murder. The court found that the deceased Sempa was also murdered. The case against all the accused rested on the question of whether the evidence established beyond reasonable doubt that each of the accused was present, aiding or abetting the killing; or had formed a common intention to prosecute an unlawful purpose in conjunction with one or

more persons, in the course of which the murders were committed, under the provisions of either s. 21 (1) (*c*) or s. 22 of the Penal Code. There was a lapse of two years between the date of the commission of the offence and the date of the trial and all the accused were known sympathisers with the Kebaka Yekka movement. There were delays in obtaining statements from witnesses on account of fear and the unco-operative attitude of the people. Twenty witnesses gave evidence for the prosecution and the learned judge rejected the evidence of all but the doctor.

Held –

(i) the prosecution had not shown beyond all reasonable doubt that the accused were present and took part in the alleged offence;

(ii) no lesser offences had been proved.

Accused found not guilty and discharged.

No cases referred to in judgment

Judgment

Goudie J: The five accused are charged jointly on the first count with the murder of police constable 191 James Nandala, on May 23, 1966, at Luwero. The third accused alone is charged additionally on count 2 with the murder of Abudala Sempa on the same date and in the same area.

On May 23, 1966 widespread disturbances took place throughout what was then known as Buganda which were apparently sparked off by the arrest of certain saza chiefs and rumours concerning the alleged arrest of the Kabaka. Reports and rumours spread from Kampala to the districts and appear to have reached Luwero market place toward mid-morning. The evidence as a whole suggests strongly that the Luwero district was at this time predominantly pro-Kabaka and the local populace started to hold meetings of protest and suggestions were made of the possibility of going to Kampala to fight for the Kabaka. During the day, the crowds increased, more rumours were spread, the shops closed, and the meetings eventually resulted in an unruly mob which decided in the late afternoon to march on the Luwero Police Post. The Assessors took the view that the arrest of some local citizens also caused indignation and that the main object to march on the police station was to release the local citizens. This may well have been one of the objects, but I have no doubt that additionally the mob as a whole intended to overrun the police post and kill the occupants and their families.

At about dusk a mob, variously estimated at between a few hundreds and five thousand, marched from the market place at Luwero to the police post. They were armed with an indeterminate number of guns, some of which were home-made, with spears, pangas, hoes, sticks and probably other weapons. It is not at all clear from the extremely conflicting evidence whether some of these weapons were collected and distributed or whether individuals armed themselves with their own individual weapons.

When the head of the procession came to within somewhere about 100 yards from the entrance to the police post, they were called upon by the police to stop, and when they failed to do so some shots were fired above their heads. When these shots failed to disperse the crowd the police, as a last resort, fired Greener guns at the crowd, in particular at those persons who were armed with guns. Shots were fired back at the police by the mob and I am satisfied on the evidence that a policeman was hit in the leg, tried to rise and was hit again and killed by a shot from some individual from the mob. Eventually the mob overran the police post and set fire to the police buildings.

The police detachment at the post consisted of the Corporal-in-charge and six constables. The Corporal was armed with a Stirling gun and at the post there were three Greener guns with the constables. Earlier in the day, however, the Corporal-in-charge, and one constable, left to try and obtain reinforcements taking with them the Stirling gun and one of the Greener guns. At the time of the attack, therefore, there were only two Greener guns and a very small amount of ammunition, about fifteen rounds altogether. After this ammunition had been almost exhausted, the policemen remaining at the post ran to their huts, warned their families to escape into the bush, discarded their own uniforms and made good their escape, leaving behind the dead body of the policeman who had been killed.

The following morning the dead body of the policeman was thrown on to a

burning lorry. The charred remains were later recovered and a post-mortem examination held.

Dr Mugerwa who conducted the post-mortem examination found 100 per cent deep burns over the entire body and the skull apparently fractured from burns. He gave his opinion that the burns were the "obvious" cause of death and there was no medical evidence to suggest that the policeman had been shot. Nevertheless, I am satisfied on the evidence as a whole that, although the burns might have been the obvious cause of death, in fact the policeman was shot to death on the previous evening and that the burns on the body were post-mortem. I am further satisfied that a police whistle and a police identification number 191, which was the Force Number of Police Constable James Nandala, was taken off the body immediately before the post-mortem examination. There was evidence that Constable James Nandala was at the post on the day of the incident and that he was never heard of alive again. I am completely satisfied that the body on which the post-mortem was performed was the body of Police Constable No. 191 James Nandala even though the features themselves were unrecognisable.

There was a certain amount of conflicting evidence to suggest that Nandala may have been shot personally by the first accused but a number of persons in the mob were armed with guns, the exact position of the first accused, if he was there at all, was not satisfactorily established, and, in my view, it is utterly impossible from the evidence to be sure that Nandala was shot by a particular person with a particular gun.

The case against all the accused on the first count therefore rests on the question of whether the evidence establishes beyond reasonable doubt that each of the accused was present aiding or abetting the killing under the provisions of s. 21 (1) (*c*) of the Penal Code or had formed a common intention to prosecute an unlawful purpose in conjunction with one or more other persons in the course of which Nandala was murdered, and his murder was a probable consequence of such common intention to prosecute such unlawful purpose, under the provisions of s. 22 of the Penal Code. There was no suggestion of any justification or excuse for the killing of Nandala and I am satisfied that the killing was unlawful and I am further satisfied that there was "malice aforethought" within the provisions of s. 186 of the Penal Code. The killing, therefore, amounted to murder.

In my detailed summing up to the Assessors, for about six hours, I stressed that, in all cases of murder arising out of riot and civil disturbances, there were great difficulties in establishing the sequence of events and the details of the events themselves because the witnesses were invariably excited, often frightened, and either themselves involved or later frightened of giving information in case they themselves became involved; and these factors made very difficult the question of identification. I further stressed that in the present case these inherent difficulties and uncertainties had been magnified by a lapse of more than two years from the date of the incident until the date of trial; by the fact that all the accused were supporters or at least sympathisers with the Kabaka Yekka movement and a considerable number of witnesses were members or office bearers of the Uganda Peoples Congress; and that the statements of many of the witnesses were undoubtedly belated; and that if a witness had kept silent between 1966 and 1968 it was extremely difficult to establish whether all the evidence was genuine and withheld previously from fear or whether there had been any settling of personal or political scores or "improvement" of the prosecution case by additional evidence from unreliable sources.

In the case of each of the accused it is necessary to decide whether the evidence

establishes beyond reasonable doubt both that the individual accused was present at the attack on the police post and also that his degree of participation was such that one can be sure that he formed a common intention to prosecute an unlawful purpose of which the murder of Nandala was a probable consequence.

With these preliminary remarks I will now deal with the evidence on the first count in relation to each individual accused.

Accused 1: I am satisfied on the undisputed evidence of Miss Crisp of the Firearms Bureau that this accused was the owner of a licensed double barrel shotgun for many years and that he was granted a permit to buy 25 cartridges in early 1966. There was no proof that the cartridges were actually purchased on this permit and some conflicting evidence as to whether any cartridges were left over from the previous year or years. Miss Crisp said this accused declared possession of two rounds in 1965 and none in 1966, whereas the accused himself said he had two rounds left over in 1966 which he had used whilst hunting in February, 1966.

I reject the accused's evidence that this gun was broken in two pieces by the metal coming away from the wooden stock when it was knocked over by a three-year-old child on to a concrete floor in March, 1966. Even allowing for the fact that the gun was an old one and second-hand when purchased, the accused himself said he used it in February, 1966 and I found it impossible to believe the story of how this gun was alleged to have been broken.

I further reject the evidence of the accused regarding the manner in which his gun is supposed to have been stolen, a week after the Luwero incident. The accused was completely contradictory as to whether he returned to his house and found the gun had disappeared or whether he had merely been told this and had never returned to his house at this time.

When questioned as to whether he remembered filling up the application form for a licence for the gun in 1966, his reply was "I have never got any ammunition".

I am therefore satisfied beyond reasonable doubt that this accused was the owner of a serviceable double barrel shotgun on the date of the Luwero incident and that this gun has disappeared in unexplained circumstances. This in itself merely establishes the opportunity to use this gun in the commission of an alleged crime and possibly subsequent disposal of the same.

I will now deal with the actual witnesses to prove the offence itself. [His Lordship then dealt with the evidence of various witnesses and continued:]

The admitted ownership of a gun and a permit for ammunition, his untrue explanations of how the gun was broken a month before the incident, and of how it was subsequently stolen, must cast the blackest suspicion on the bona fides of the first accused. There is, however, considerable force in the opinions of the Assessors that there is nothing in the evidence which has been accepted as reliable evidence to disprove that this accused originally went to the scene to answer an alarm in accordance with Uganda custom and that even if he went with a gun this would be justifiable in the circumstances, particularly as an ex-chief. For myself, I do not accept that this would explain why he should accompany the crowd towards the police post. Nevertheless, the evidence of his having formed a common intention with anyone to attack the police post is affirmatively not particularly strong. I agree also with the Assessors that there is some support for his story, that he was running away when shot, in the evidence of Dr Kim which was to the effect that the scars on his legs, which were accounted for by the pellets shown in the

legs in the radiograph pictures,

were all in the back of the legs. The doctor agreed that this suggested that the injuries were inflicted when he was facing away from the source of the gun-fire.

Viewing the evidence relating to the first accused in its entirety I agree with the opinions of the Assessors and I find that the degree of doubt is such that it is impossible to be satisfied beyond reasonable doubt that this accused was taking part in an attack on the police post and affirmatively shown to have formed a common unlawful intention to prosecute an unlawful purpose the probable consequence of which was the murder of the police constable. The first accused will therefore be acquitted and he is discharged.

Accused 2: [His Lordship then considered the evidence against the second accused and continued:] Had this accused been called upon to prove his own innocence he might have been in considerable difficulty. I consider, however, that my analysis of the prosecution evidence shows how basically weak it is in establishing either this accused's presence or whether, and if so, how he was armed or what part, if any, he took. I must also bear in mind, as was pointed out in Tanzanian Criminal Appeal 12 D 68 in February this year by Georges, C.J.:

> "The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts."

This seems to me to be a very adequate summing up of the situation in the instant case.

The second accused is acquitted and will be discharged.

Accused 3: [His Lordship then considered the prosecution evidence against the third accused and continued:] This accused's defence was a very strong circumstantial alibi covering his alleged journey to Kaswama Market on the morning of May 23, 1966, his presence at the market during the day, and the unusual events which he said befell him on his return journey, which included running out of petrol after many diversions on account of damaged roads, abandoning his own vehicle at his brother's place, obtaining a lift and then having to abandon that vehicle as it was impossible to get through to Luwero, and eventually arriving home near Luwero in the early hours of the morning.

If reasonably capable of belief this alibi is more than something capable of raising a doubt but would be bound to make one feel that it was affirmatively highly probable that this accused was nowhere near Luwero at the time of the murders as alleged. If positively believed it is also bound to have the effect of doubting the veracity, or at least the reliability, of all the witnesses who say he was, even in relation to their other evidence. Its importance, therefore, can hardly be exaggerated.

The strength of this alibi lies in that in all its basic details, the trip to Kaswama, running out of petrol and abandoning the accused's vehicle, getting a lift and abandoning the second vehicle, and eventually arriving home on foot, this story was related in his statement in answer to the charge which is dated November 28, 1966, eight days after this accused's arrest. It has been supported by witnesses whom accused is supposed to have met at various stages of his homeward journey and by people whom he is supposed to have met at the market. There may have been some discrepancies in their evidence but not only were they substantially unshaken in a searching cross-examination but they contrasted generally to the detriment of the majority of the prosecution witnesses in their seeming straightforwardness and willingness and ability to answer questions.

It was suggested by the learned State Attorney that since certain persons named in the alibi as originally put forward had not been called as defence witnesses I ought to assume that if they had been called they would have been adverse to the accused. If there is any inference to be drawn I think it is the other way. The alibi was put forward at the first available opportunity, in answer to the charge. It was, therefore, the duty of the police to check it. Presumably if this was done and the persons named failed to support the alibi they would have been called as prosecution witnesses.

I am not altogether clear as to the Assessors' views about this alibi but I have no doubt that it does much more than raise a reasonable doubt as to this accused's presence at the scene when weighed against the, for the most part, very unsatisfactory and unreliable prosecution evidence and I think it is at least as likely to be the truth as the prosecution case against this accused.

[His Lordship then proceeded to deal with the second count:] The evidence against this accused of responsibility for the death of Sempa is at best extremely flimsy. There is no reliable evidence at all showing just how Sempa was killed. It is clear from the medical evidence that he was murdered by being virtually cut to ribbons but how and by whom has not, in my view, been established in evidence. [His Lordship then discussed the evidence against this accused, and continued:]

This accused is acquitted on counts 1 and 2 and will be discharged.

Accused 4: [His Lordship, after analysing the evidence against this accused, said:] I do not consider the charge established against this accused beyond reasonable doubt and he is acquitted and will be discharged.

Accused 5: [His Lordship also analysed the evidence against this accused and said:] I find the charge against this accused not proved beyond reasonable doubt and he is acquitted and will be discharged.

Nothing in my judgment should be taken to mean that I regard the police case as in any way dishonest or that any attempt appears to have been made to "frame" the accused. I also fully appreciate the difficulties and delays in obtaining statements from a frightened and perhaps unco-operative populace. But I must deal with the evidence as it stands and not as I might conjecture it might have been but for possibly unavoidable delays. Although I make no suggestions that the police "improved" their case by the introduction of belated witnesses and statements I cannot automatically assume that witnesses had no ulterior motives in remaining silent for long periods.

Finally, on the evidence I have heard I do not consider any lesser offences have been proved to have been committed by any of these accused so the question of reduced charges mooted by Defence Counsel does not arise.

Orders accordingly.

For the first and third accused:
SV Pandit
SV Pandit, Kampala

For the second and fourth accused:
MP Vyas
MP Vyas, Kampala

For the fifth accused:
HR Ahmed
HR Ahmed, Kampala

For the prosecution:
VM Patel (State Attorney, Uganda)
Director of Public Prosecutions, Uganda

Peera and others v Della Santa
[1969] 1 EA 210 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	29 August 1968
Case Number:	10/1968 (176/68)
Before:	Georges CJ
Sourced by:	LawAfrica

[1] Rent Restriction – Rent Tribunal – Effect of order – Cannot be retroactive to a date before the Act came into operation – Rent Restriction Act 1962 (*T.*).

[2] Rent Restriction – Rent Tribunal – Procedure to be followed – Natural Justice – ss. 9 (3), 11 (4) *and* 39, *Rent Restriction Act* 1962 (*T*).

[3] Rent Restriction – Standard rent – Assessment – "Special circumstances" – s. 4 (1), *Rent Restriction Act* 1962 (*T*).

Editor's Summary

The appellants, as landlords, challenged the order of the Rent Tribunal fixing the standard rent of the suit premises (which were business premises) at Shs. 2,500/- per month and decreeing the effective date of the order as April 1, 1966. The premises, at the time of the hearing by the Tribunal, were let to the respondents at a monthly rent of Shs. 5,450/- and they asked the Tribunal to reduce the standard rent to conform with that of adjoining properties. The appellant challenged the order of the Tribunal on the ground that the factors taken into account by the Tribunal as "special circumstances" did not amount to "special circumstances" under the Rent Restriction Act. The Tribunal did not specify whether they were acting under paras. (*a*) or (*b*) of s. 4 (2) of the Act, and the Court found it necessary to consider both possibilities. Under para. (*a*) the Tribunal might have been basing its decision on the fact that the rent appeared to be well above the rent for comparable premises in the area and allowed for a return on investment well above the 14 per cent prescribed for newly constructed buildings. It might have considered that these were special circumstances justifying its power to alter the rent, whether by way of increase or reduction to a figure which the Tribunal, in all the circumstances, considered fair. Under para. (*b*) there would have to be some evidence on the record to indicate that there was some factor in the rent

paid by the respondents which would be peculiar to them and the landlords, so as to justify the rent being a "nominal, fictitious or collusive" rent within the meaning of the paragraph. The Court was also asked to consider the proper procedure to be followed by such a Tribunal in the hearing of such a case.

Held –

(i) the question of the disparity of rents as a method of assessment was only to be used in cases falling within s. 4 (1) (*b*) and 4 (2) (*b*) of the Act and could not therefore apply to a case considered under s. 4 (2) (*a*);

(ii) there was no intention within the Act to place the 14 per cent return figure as a ceiling in cases other than those of buildings erected or substantially constructed after the prescribed date;

(iii) "special circumstances" within para. (*a*) appeared to be confined to matters which concerned the parties themselves and not the premises in relation to other premises in the area;

(iv) if the Tribunal purported to have acted under para. (*b*) on the grounds that the rent was nominal, fictitious or collusive, the decision was not supported by any evidence;

(v) the Tribunal had no power to fix a standard rent retroactively to a date before the date on which the Rent Restriction Act came into force within the area;

(vi) the standard rent should be fixed as Shs. 5,450/- as from January 1, 1965.

Observed: The Tribunal had based its findings on certain considerations in regard to which there appeared to be no evidence at all in the proceedings. It was against natural justice to decide a case on a point noted by the Tribunal as a result of its own knowledge so the landlords would have had no opportunity of contradicting it if they had so wished.

Appeal allowed with costs.

Cases referred to in judgment:

(1) *Bhardia v. Patel*, [1963] E.A. 494.

(2) *W. Tassan and others v. Hooseni Sisal Estate Ltd*., [1964] E.A. 726.

(3) *R. v. Brighton and Area Rent Tribunal ex parte Marine Parade Estates* (1936) Ltd., [1950] 1 All E.R. 946.

(4) *Colonial Boot Co. v. Dinshaw Byramjee & Sons* (1952), 19 E.A.C.A. 125.

(5) *Sharifu Marfudh v. Joseph Austin Marulo* (Tanganyika High Court Miscellaneous Civil Appeal No. 3 of 1967) (unreported).

(6) *R. v. Paddington and St. Marylebone Rent Tribunal ex parte Bell London and Provincial Properties Ltd*., [1949] 1 All E.R. 720.

(7) *Board of Education v. Rice*, [1911] A.C. 179.

Judgment

Georges CJ: The appellants, hereinafter referred to as the landlords, challenge the order of the Rent Tribunal fixing the standard rent of certain premises, hereinafter referred to as the suit premises, consisting of a shop with a mezzanine floor and a store in a building at the corner of Independence Avenue and Bridge Street, in Dar-es-Salaam. The respondent, hereinafter referred to as the tenant, holds the premises under lease for a term of three years commencing April 1, 1966, at a monthly rent of Shs. 5,500/- payable quarterly in advance. At the time of the signing of the lease, the suit premises, being business premises, were not controlled. On January 1, 1967 the Rent Restriction (Amendment) (No. 2) Act 1966 came into force and brought business premises under control. The prescribed date for ascertaining the standard rent of newly controlled business premises was fixed at January 1, 1965. On the date, the suit premises were let to Messrs. T.O.M. (Twentsche) Ltd., as a showroom, at a rent of Shs. 5,450/- per month. The tenant asked that the "standard rent be scaled down to conform with that of adjoining properties and so as to reflect a just return on the purchase price thereof". He alleged that the rent was "extortionate".

The Board held:

> "that the agreed rent of Shs. 5,500/- per month between the parties, which was also the rent on the prescribed date, should not be adopted as the standard rent because it was not a fair and economic rent in relation to premises, as it was rent peculiar to the parties, i.e. between Messrs. T.O.M. Ltd. on the one hand and the respondents on the other. No other tenant on Independence Avenue paid as high a rent as paid by Messrs. T.O.M. Ltd. to their landlords on the prescribed date. The Tribunal, therefore, is satisfied that there are the

special circumstances of this case under which it would be fair and reasonable to alter by way of reduction the amount of the standard rent as ascertained in accordance with subsection 4 (1) of the Act, which is the agreed rent and also the rent on the prescribed date."

They fixed the standard rent at Shs. 2,500/- per month and decreed the effective date as April 1, 1966.

Mr Kassam for the landlords has advanced a number of criticisms of the

judgment. The cardinal criticism, it would appear to me, is that the factors taken into consideration by the Board as special circumstances did not amount to special circumstances under the Act.

I would venture to think that the purpose underlying the Rent Restriction Act and its amendments is the stabilising of rents at the level existing on a certain prescribed date. Section 4 (1) (*a*) of the Rent Restriction Act 1962, as amended, reads:

> "The expression 'standard rent' in relation to any premises means –
>
> (*a*) a rent determined by a Tribunal to be the rent at which the premises were let at the prescribed date."

Certain provisos then follow, which are not relevant. Paragraphs (*b*), (*c*) and (*d*) of s. 4 contemplate situations in which the premises are not in fact let on the prescribed date and set out provisions for determining the standard rent in those circumstances. Thus, where the premises were in existence but were not let at the prescribed date, then the Board is to assess a rent at which such premises would reasonably have been let at the prescribed date having regard to the rents at which premises of a similar character in the neighbourhood were let at the prescribed date. This applies to both commercial and residential premises. Paragraph (*c*) provides that where the premises were built or substantially reconstructed after the prescribed date, then the rent should not exceed 14 per cent of the cost of construction or reconstruction, as the case may be, plus a proportionate share of ground rent and rates payable in respect of the land on which they are erected. Paragraph (*d*) makes provision for furnished premises.

The suit premises in this case were let on the prescribed date, and normally, therefore, the standard rent would be the rent at which they were let on that date. Section 4 (2), however, provides certain exceptions. It is not clear under which of the exceptions the Board acted in this case, but it would appear that it must have done so under either one of two paragraphs – (*a*), which reads:

> "In the case of any premises in regard to which a Tribunal is satisfied that in the special circumstances of the case it would be fair and reasonable to alter whether by way of increase or reduction the amount of the standard rent as ascertained in accordance with subsection (1), the Tribunal may assess the standard rent of such premises at such figure as the Tribunal shall in all the circumstances of the case consider reasonable."

or paragraph (*b*), which reads:

> "In the case of any premises in regard to which a Tribunal is satisfied that it is not reasonably practicable to obtain sufficient evidence to ascertain the rent at which such premises were let at the prescribed date, or that the rent at the prescribed date was a nominal, fictitious or collusive rent, the Tribunal shall have power to determine the rent at the prescribed date as being of such amount as the Tribunal thinks proper having regard to the rents at which premises of a similar character in the neighbourhood were let at the prescribed date."

In their ruling, the Board refers to special circumstances, indicating that they may have had section 4 (2) (*a*) in mind. On the other hand, they also refer to the fact that the rent paid by Messrs. T. O. M. Ltd. was

> "not a fair and economic rent in relation to premises, as it was rent peculiar to parties, that is between Messrs. T. O. M. Ltd. on the one hand and the respondents on the other."

The question as to the particular paragraph under which the Tribunal acted

may be of some importance. If it was acting under paragraph (*b*), then there was no evidence on which it could possibly hold that the rent paid by Messrs. T. O. M. Ltd. to the landlords was collusive. Very clearly, it could not have been either nominal or fictitious.

In argument before the Tribunal, reference was made to the case of *Virji N. Bhardia v. Mrs Kashiben Purshottam Patel*, [1963] E.A. 494. In that case, Mr Justice Biron discussed the meaning of the word "collusive". He held that the word "collusive" did not necessarily contain "an element of mala fides". It did not connote something morally wrong, and he held:

> "collusive rent is thus capable of meaning a rent agreed between the landlord and tenant, which for some reason or other, neither dishonest nor tainted with mala fides, is peculiar to the parties as distinct from the premises, and it can also mean that such rent has an element of dishonesty or mala fides. Although the narrower meaning of collusive is the more popular, the wider meaning is not obsolete."

There is nothing in the record to indicate that there was any factor in the rent paid by Messrs. T. O. M. Ltd. which would be peculiar to them and the landlords and not to the premises. Indeed, the fact that the tenant in April, 1966 undertook to pay exactly the same rent would be some indication that, far from being a rent peculiar to the parties, T. O. M. Ltd. and the landlords, it was a rent attached to the premises, a rent which the tenant was willing to agree to pay on the terms of a three-year lease. If, therefore, the Tribunal was acting under that particular paragraph, I would hold that the decision was not supported by any evidence.

On the other hand, it may be that the Tribunal was in fact basing its decision on paragraph (*a*) and holding that the fact that the rent appeared to it to be well above rent for comparable premises in the area and also appeared to allow for a return on the investment well above the 14 per cent prescribed for newly constructed buildings, were special circumstances justifying the exercise of the power to alter it whether by way of increase or reduction to a figure which the Tribunal in all the circumstances considered fair.

If that is the position, then it becomes necessary to examine the meaning of the term "special circumstances" referred to in paragraph (*a*).

Mr Kassam points out that the Act provides that the rent of comparable premises should be used as a yard-stick in assessing the standard rent in two-circumstances: the first, under s. 4 (1) (*b*), which, as amended, reads:

> "where the premises were in existence but were not let at the prescribed date and were or are subsequently let, a rent to be assessed by the Tribunal as the rent at which such premises would reasonably have been let at the prescribed date having regard to –
>
> (i) where such premises are a dwelling house, the rents at which other premises (being premises to which the provisions of the Rent Restriction Ordinance applied) of a similar character in the neighbourhood were let at the prescribed date; and
>
> (ii) where such premises are commercial premises, the rents at which other premises of a similar character in the neighbourhood were let at the prescribed date."

The second is set out in s. 4 (2) (*b*) – that is the case in which the standard rent as normally ascertained is considered nominal, fictitious or collusive, and then the Tribunal –

> "shall have power to determine the rent at the prescribed date as being of

> such amount as the Tribunal thinks proper having regard to the rents at which premises of a similar character in the neighbourhood were let at the prescribed date."

It would appear to me that the fact that reference is made to this method of assessment in two particular cases indicates an intention that it should be used in those cases and no other. If the disparity of standard rents as arrived at by the application of 4 (1) was intended to be a special circumstance under (2) (*a*) of that section, it could have been so stated, and, in my view, would have been so stated.

I do not see in the Act either any intention that landlords should as a general rule not receive more than 14 per cent of the sum which they may have invested in acquiring any building. The ceiling of 14 per cent is placed only as regards buildings erected or substantially reconstructed after the prescribed date. When the Act goes on to contemplate other situations – for example, the situation of premises which were not let on that date, or where they were let but at a collusive rent – it makes no mention of a 14 per cent return on investment as an appropriate guide for the assessment of a standard rent. This would, indeed, have been a very simple thing to do, that is to say, to prescribe that the rents of premises should not exceed 14 per cent of a fair valuation of their price. But this has not been the method chosen. Rather, the yard-stick of rents of comparable buildings has on two occasions been chosen, and I cannot read into the Ordinance an intention to impose such a ceiling.

It should be noted also that specific instances of special circumstances under paragraph (*a*) of section 4 (2) are stated in the Ordinance itself, and among them are:

> "(i) the temporary nature of the construction of the premises concerned or the temporary nature of the lease or licence under which the land on which the premises are situate is held, or the fact that the premises can be expected to be let only during a certain period of the year, as a result of which foregoing factors the standard rent as defined in subsection (1) would yield an uneconomic return to the landlord;
>
> (ii) any change in the size or character of the premises, or any expenditure incurred by the landlord on substantial improvements or structural alterations to the premises, other than for ordinary or necessary repairs, or on substantial improvements made to any land on which the premises are erected or to any roadway adjacent to such land other than for necessary maintenance and drainage, or in providing a suitable water supply or sewerage system or the extension of such a water supply or sewerage system from which the tenant derives benefit;
>
> (iii) any case where the rates payable by the landlord at any time are less than the rates which were payable by the landlord at the time when the premises were let to the tenant."

The Act makes it clear that these illustrations are not restrictive. Nonetheless, I think they can be fairly looked to as indicative of the type of circumstance which may be regarded as a special circumstance. It should be noted that they are all matters which concern the premises themselves and not the premises in relation to any other premises in the area.

I am satisfied, therefore, that the alleged disparity in the rent between the suit premises and neighbouring premises cannot be held to be a special circumstance within the meaning of s. 4 (2).

It must not be forgotten that if that principle is once accepted, it can be used to justify not only a reduction of rent, as in this case, but an increase in

rent. A landlord would then be entitled to come to the Court and say that the rent which he was getting on the prescribed date, although freely negotiated and accepted, was now much lower than rents of comparable premises in the area, and he could ask, therefore, that it should be increased. This was the sort of situation which arose in the case of *W. Tassan and Two Others v. Hooseni Sisal Estate Ltd*., [1964] E.A. 726. In that case, Mr Justice Weston (as he then was) said, at page 729:

> ". . . As to principle, and confining myself to the determination under the Rent Restriction Act of the standard rent of unfurnished premises in existence on the prescribed date, the clear intention of the legislature is to maintain rents at the level prevailing on that date. To this end, provision is made to restrict the increase of any rent that was in fact being paid on that date (see s. 4 (1) (*a*)), or where that rent was a nominal, fictitious or collusive rent, or where it is not reasonably practicable to ascertain what rent was being paid (see s. 4 (2) (*b*)), or where any premises were not let at that date so that no rent was in fact being paid (see s. 4 (1) (*b*)), the rent that a landlord could reasonably have obtained on that date. The maintenance of this level is the principal object of the Act and it is the first duty of a Board to ensure that this object is achieved. It is not for a Board to question the economics or the reasonableness of any such rent in the first place, and it is that rent which, to use the Board's expression, is 'the basis on which it should work'."

In that particular case, the rent of two flats near Salandar Bridge, Dar-es-Salaam, had been Shs. 550/- and Shs. 350/- per month respectively. Some years before, the flats had fetched Shs. 800/- and Shs. 729/- respectively, and at the date when an application was made to fix the standard rent, it was the view of the Board that "the usual rental per month for flats in the vicinity of Salandar Bridge and Kingsway is at the very least Shs. 700/- per month and upwards". The Board, therefore, held:

> "that when the three flats in cases Nos. 52–54 of 1964 were let at the prescribed date, the rent charged was a low rent due to the depression and that it would be inequitable to take these figures as the starting point for assessing the standard rent today, particularly in view of the rents paid for similar premises in the immediate vicinity."

The High Court allowed the appeal against this assessment and fixed the standard rent as the rent at which the premises were let on the prescribed date.

I entirely agree with the reasoning in arriving at the decision in this case. It is true that the circumstance now under consideration – the argument used by the Board in *Tassan's* case – has been used to reduce the rent rather than increase it, but it is clear that it could be used for either purpose, and it would, in my view, be an undesirable inroad on the whole concept underlying the scheme of rent control now in force.

The reasons which I have stated above are sufficient to dispose of this appeal. I was, however, addressed at some length on the question of the proper procedure to be followed by the Tribunal in hearing such cases, the right of the Tribunal to act on its own knowledge and on evidence not led before it, and its right also to make findings not clearly supportable on the evidence contained in the record. In particular, reference was made to the case of *R. v. Brighton and Area Rent Tribunal ex parte Marine Parade Estates* (1936) *Ltd*., [1950] 1 All E.R. 946. In that case, the Court held that the proceedings of a Rent Tribunal under the Landlord and Tenant Rent Control Act 1949 did not necessarily require that there should be a hearing like that of a Court, but contemplated that the Tribunal could act on its own knowledge and information without

evidence, unless submitted, and without a hearing, except on notice from a party. I do not think that this decision is strictly applicable to Tanganyika, as the law here is quite dissimilar. In England at that time, regulations had been made prescribing the procedure to be followed by the Board. These regulations laid down, among other things, that applications were to be made in writing specifying certain particulars; that after the application had been made, the Tribunal would give notice in writing to each party to the tenancy informing him that he might give notice to the Clerk of the desire to be heard. The parties could also, if they wished, send representations in writing instead of attending. Provided that any party stated that he wished to be heard, then the Tribunal would give each party not less than seven days' notice in writing of the time and place at which they would be heard. It was in this context that Lord Goddard, C.J., stated:

> "That, again, is significant. It is only if the parties give notice that they desire to be heard that they are to have notice of the time when and place at which the Tribunal will consider the matter. The Tribunal must consider the matter once the statutory form has been sent in. Therefore, it is clearly the intention of the Act and of these regulations that the Tribunal may proceed and give a decision without hearing either party unless a party states that he wishes to be heard. Obviously, therefore, Parliament intended the procedure of these tribunals to be of the most informal nature. No court can proceed to hear a case without having some evidence before it, nor can it give any judgment affecting a person's rights to property unless that person not only is before the court, but also has an opportunity of cross-examining the other party. Parliament, however, has said that the ordinary procedure to which lawyers are accustomed shall not apply to these cases."

There are no such regulations in Tanganyika. Section 39 of the Act gives the Minister power to make regulations prescribing, among other things:

(*a*) the manner in which the Board shall conduct its business;

(*b*) the procedure in connection with any application to or the determination of any matter by a Board;

(*c*) the matters which shall be taken into account by a Board in exercising its powers under this Act.

Regulations have been made prescribing for forms, fees and costs for the enforcement of determinations or orders of the Board, and rules have also been made under s. 11 (4) providing for the procedure on appeal. Section 9 (3) itself provides that in determining any matter, the Board may take into consideration any evidence which it considers relevant to the subject of the enquiry before it, notwithstanding that such evidence would not be admissible under the law relating to evidence. Clearly, technical rules such as the rules against hearsay and the rules requiring the production of original documents would not apply. But the so-called rules of natural justice would have a relevance here which they could not have in the English situation where determination of the rights of the parties in their absence is clearly contemplated.

The matter was discussed in *Colonial Boot Company v. Dinshaw Byramjee & Sons* (1952), 19 E.A.C.A. 125. The Court of Appeal was there considering Kenya legislation which, as regards the matter under consideration, is identical with the legislation here. Speaking on behalf of the Court, the President, Sir Barclay Nihill, stated, at page 128:

> "First, it must be borne in mind that the procedure of the Central Rent Control Board at the material time was not, nor is now, covered by any

> statutory rules, although there is provision in the Ordinance for their enactment. The only test this Court can apply therefore and which has been applied in past cases is to see in each case whether the informality practised can be said to offend against natural justice. If in the opinion of this Court it does not, then we have refused and shall continue to refuse to upset a decision on this ground."

It is against natural justice to decide a case on a point noted by the Board as a result of its own efforts and not specifically communicated to the parties so as to allow them an opportunity, if they wish, for contradicting it. In *Sharifu Marfudh v. Joseph Austin Marulo*, Miscellaneous Civil Appeal No. 3 of 1967, I said:

> "Obviously, a Board can take into account its own knowledge of what rents are in a particular area for a certain type of accommodation. Often it may have fixed the rent itself and would be well aware of the pattern. The Board cannot, however, find out 'from the neighbourhood as to the rent chargeable', and then act on that. It would be acting on evidence which the parties have not heard and have had no opportunity of challenging."

This would appear also to have been the view taken in the English Courts. In *R. v. Paddington and St. Marylebone Rent Tribunal ex parte Bell London and Provincial Properties Ltd.*, [1949] 1 All E.R. 720, Lord Goddard, C.J., stated:

> "In giving their decision, the Tribunal said:
>
> > 'In fixing the rents of the various flats, it is not out of place to point out that these flats are not up to modern standards. In no single flat is the ceiling more than eight feet from the floor. This is less than is required by present day standards.'
>
> . . . It is no part of the duty of this court to review a finding of fact by the Tribunal, though it is certainly remarkable that it should be found that flats of this description, erected, as we were informed, very shortly before the late war, the plans of which must have been passed and approved by the London County Council, do not conform to present day standards when it is notorious that the building of this class of flats has not been allowed since the war, but not a word was said by anybody during the hearing, or at any time before the decision was given, as to this being a ground for reduction of rent. In fact, it took the advisers of the landlords entirely by surprise, and surely in common fairness, if this was to be considered by the Tribunal, they ought to have given the applicants some opportunity of dealing with it. That this could ever have been in the minds of the borough council in referring these matters, it is impossible to suppose, and, as we have already said, not a single word was said by the representative of the borough council as to any of the grounds on which the Tribunal was invited to act. In our opinion, to take into account a matter of this kind, of which no sort of intimation had been given to the landlords, brings this case exactly within the decision of the House of Lords in *Board of Education v. Rice*, [1911] A.C. 179, the judgments in which are so well known that we need not set them out. On that ground alone we think that the eight determinations in this case, even if the references were unobjectionable, would have to be quashed."

In this case, the Board based its finding on certain considerations in regard to which there would appear to be no evidence at all in the proceedings. For example, they said that the suit premises were, prior to the occupation of Messrs.

T. O. M. Ltd., let at only a very nominal rent of Shs. 650/- a month. There was no evidence to support that, and even if there was, the matter is quite irrelevant, since the Board itself found that the rent was nominal. The Tribunal also noticed that even during the period of de-control, the rents of premises in Independence Avenue were not raised in general and stayed as before. Again, there was no evidence on the record to support that fact. It did not appear to have been in issue in the course of the proceedings, so that the landlords would have had no opportunity of contradicting it, if they wished. As I have indicated, these circumstances are not important in the light of the decision which I have set out above as to the meaning of "special circumstances", but as they were agitated before me, it appeared reasonable to state some opinion on them for the guidance of Boards.

In the result, I am satisfied that on the evidence before the Board, they could have come to no other conclusion but that the standard rent was the rent at which the premises were let on January 1, 1963, that is Shs. 5,450/- a month and it is accordingly fixed at that rate.

It is noticed that the Board made its finding retroactive to April 1, 1966. This cannot be right. The Board does have power to fix a standard rent retrospectively, but the fact of the matter is that the premises were not controlled on April 1, 1966. It was not possible to make the rent retroactive beyond the date on which the Rent Restriction Act came into force, which was January 1, 1967.

Accordingly, the appeal is allowed with costs.

Appeal allowed.

For the appellant:
NM Kassam
Kassam and Co, Dar-es-Salaam

For the respondents:
Ranbir Singh
Awtar Singh & Co, Dar-es-Salaam

Hitila v Uganda
[1969] 1 EA 219 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	19 December 1968
Case Number:	73/1968 (1/69)
Before:	Duffus, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda – Goudie, J

[1] Appeal – To High Court – By prosecution – Whether prosecution has right of appeal under Magistrates' Courts Act (*Cap.* 36), *s.* 30 (*U.*).

[2] Criminal Practice and Procedure – Appeal – By prosecution – Whether prosecution has a right of appeal to High Court under Magistrates' Courts Act (*Cap.* 36), *s.* 30 (*U.*) *– Petition for revision by prosecution – Criminal Procedure Code* (*Cap.* 107), *ss.* 341 (1) (*a*), *and* 341 (5) (*U.*).

[3] Criminal Practice and Procedure – Revision – Petition for, by prosecution – Right of – Criminal Procedure Code (*Cap.* 107), *s.* 341 (1) (*a*) (*U.*).

Editor's Summary

A magistrate grade 1 found the appellant guilty of robbery with aggravation and sentenced him to three years imprisonment, but omitted to order the implementation of corporal punishment as required by s. 274 (A) of the Penal Code. The Director of Public Prosecutions petitioned the High Court for an order in revision under s. 341 (1) (*a*) of the Criminal Procedure Code asking for an enhancement of the sentence; and an order was made requiring the accused to receive twelve strokes. The sentence of three years imprisonment was confirmed. The appellant then, with leave of the High Court, brought this appeal to the Court of Appeal on the question whether the Director of Public Prosecutions has a right of appeal to the High Court under s. 30 of the Magistrates' Courts Act, in which event the Director would have been barred by s. 341 (5) of the Criminal Procedure Code from any right to petition for revision.

Held – the Director of Public Prosecutions has no right of appeal under the Magistrates' Courts Act. Under s. 325 of the Criminal Procedure Code (U.) the Director has a right to appeal to the High Court in the event of an acquittal, but he has no general right to appeal under s. 30 of the Magistrates' Act. Accordingly the petition for revision was correct.

Appeal dismissed.

No cases referred to in judgment

Judgment

The following considered judgment of the Court was read by **Duffus JA:**

The appellant was convicted on June 12, 1967 by a magistrate grade 1 on a charge of robbery with aggravation contrary to ss. 272 and 273 (1) (*b*) of the Penal Code and sentenced to three years' imprisonment. The Director of Public Prosecutions petitioned the High Court on November 16, 1967 for an order in revision under s. 341 (1) (*a*) of the Criminal Procedure Code asking for an enhancement of the sentence on the grounds that

(*a*) three years' imprisonment for the offence of robbery contrary to ss. 272

and 273 (1) (*b*) of the Penal Code was so lenient as to amount to a miscarriage of justice, and

(*b*) that the mandatory corporal punishment required by s. 274 (A) of the Penal Code had not been imposed.

A judge of the High Court heard the application for revision and the appellant was called on to say why the sentence should not be increased. The judge made an order in revision and while refusing to increase the sentence of three years' imprisonment ordered that the omission of the magistrate to comply with this provision of s. 274 (A) of the Penal Code be rectified and that the appellant receive twelve strokes in addition to the sentence of three years' imprisonment.

The appellant then with the leave of the High Court appealed to this Court on a question of law. The question is whether the Director of Public Prosecutions has a right of appeal to the High Court under s. 30 of the Magistrates' Courts Act (Cap. 36) and was accordingly barred by sub-s. (5) of s. 341 of the Criminal Procedure Code (Cap. 107) from petitioning the High Court for revision of the case.

The Criminal Procedure Code provides both for appeals and revisions but these provisions have been amended by the Magistrates' Courts Acts of 1964 and 1966. Broadly speaking, before the 1964 amendment the Code gave a convicted person a right of appeal against conviction, and the Director of Public Prosecutions a right of appeal against an acquittal on the ground of an error in law, whilst the power of revision was a discretionary power vested in the High Court.

In exercising its power of revision the High Court could use its wide powers in any proceedings in which it appeared that an error material to the merits of the case or involving a miscarriage of justice had occurred, and could do so in any proceedings where this appeared from any record that had been called for by the Court, or which had been reported for orders, or in any proceedings which had otherwise been brought to its notice. In this case the error in law in not carrying out the mandatory provisions with regard to sentence had been brought to the attention of the High Court by a petition from the Director of Public Prosecutions. The appellant claims that the Director of Public Prosecutions had a right of appeal under s. 30 of the Magistrates' Courts Act so that the provisions of sub-s. (5) of s. 341 of the Criminal Procedure Code applied and prevented his proceeding by way of a petition for revision. Sub-section (5) reads:

> "Where an appeal lies from any finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

The appellant claims that the Director of Public Prosecutions had a general right of appeal under s. 30 of the Magistrates' Courts Act. Section 30 as amended by Act 20 of 1966 reads as follows:

> "3.(1) Subject to the provisions of this Act, an appeal shall lie as of right –
>
> (*a*) to the High Court from the judgments, decisions or orders of a magistrate's court presided over by a Chief Magistrate or magistrate grade 1, in the exercise of his original and appellate criminal jurisdiction;
>
> (*b*) to a magistrate's court presided over by a Chief Magistrate from judgments, decisions and orders of a magistrate's court presided over by a magistrate grade 2 or grade 3 in the exercise of his criminal jurisdiction.

(2) An appeal under the provisions of this section may be on a matter of fact or on a matter of law or on a matter of mixed fact and law.

(3) Any person convicted on trial by a magistrate's court shall be informed of his right of appeal at the same time as sentence is passed.

(4) Notwithstanding the provisions of any other enactment providing for an appeal from a decision of a magistrate's court to the High Court such an appeal shall lie to the appeal court stipulated by this Act;"

This section replaced the right of appeal formerly given to a convicted person under s. 323 of the Criminal Procedure Code. The repealed s. 323 read as follows:

"(1) Save as hereinafter provided, any person convicted on a trial held by any subordinate court may appeal to the High Court, and shall be so informed by the magistrate at the time when sentence is passed.

(2) An appeal to the High Court may be on a matter of fact as well as on a matter of law."

It is to be noted that whilst the repealed s. 323 gave a right of appeal only to a "convicted person", s. 30 does not state in whom a right of appeal is now vested. The question therefore arises whether this is a right given to any person, or whether it is restricted only to parties in the proceedings, or only to a person convicted? Clearly s. 30 applies to a person convicted at the trial since sub-s. (3) of that section specifically states that he shall be informed of his right of appeal when sentence is passed, but has anyone else been given this right of appeal? This appeal is only concerned with the rights of the Director of Public Prosecutions under this section.

The Director of Public Prosecutions' right to appeal against an acquittal is specifically set out in s. 325 of the Criminal Procedure Code which states:

"When an accused person has been acquitted by a magistrate the Director of Public Prosecutions may appeal to the High Court from such acquittal on the ground that it is erroneous in law."

There can be no doubt that this section was intentionally kept in force by the various amending acts. The 1964 Magistrates' Courts Act which repealed s. 323 of the Criminal Procedure Code and substituted the right of appeal by s. 30 also amended s. 324 of the Code which restricts the right to appeal in the case of a person who pleaded guilty, but s. 325 remained in its entirety. It would appear that Parliament intended that the right of appeal of the Director of Public Prosecutions was that given by s. 325 of the Code and that the Director was not one of those persons who have been given an unrestricted right of appeal under s. 30. Section 30 gives a right to appeal against any judgment, decision or order of the Magistrate and this would include an order of acquittal, so that if it was intended to give this unrestricted right to the Director of Public Prosecutions then Parliament would not have retained s. 325 which would then have been superfluous. Parliament must be deemed to have fully considered all the circumstances in this matter and to have intentionally retained the special provisions for appeals by the Director of Public Prosecutions under s. 325, and the presumption is that Parliament intended that this section should be the section giving the Director of Public Prosecutions the right to appeal in the circumstances therein set out, and did not intend that the general right of appeal given by s. 30 should extend to the Director of Public Prosecutions.

We are therefore of the view that the Director of Public Prosecutions has no right of appeal under s. 30 of the Magistrates' Courts Act (Cap. 36) and that

he therefore had no right of appeal in this case. The Director of Public Prosecutions was therefore entitled to bring his petition for revision. We are satisfied that the learned judge of the High Court properly reviewed the matter and correctly made his order in revision. The appeal is dismissed.

Appeal dismissed.

For the appellant:
SH Dalal
Dalal & Singh, Kampala

For the respondent:
AM Khan (State Attorney, Uganda)
Attorney-General, Uganda

Lwanyaga and others v Uganda
[1969] 1 EA 222 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	29 November 1968
Case Number:	39/1968 (180/68)
Before:	Duffus, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda – Sir Udo Udoma, C.J

[1] Evidence – Mistake by witness – Whether admission by witness that his evidence is mistaken should be rejected if subsequently proved that there was no mistake.

Editor's Summary

Six appellants appealed against their conviction for robbery. After reviewing the evidence the convictions of five of six appellants were upheld, the defence of "alibi" being rejected. It is in respect of the appellant (the third appellant) whose appeal was allowed that this case is reported. On February 6, 1968 Mr. Kafero, a magistrate, was called as a witness to support the third appellant's alibi. The robbery occurred on August 30, 1966 between Jinja and Kakira. The witness testified that on August 29 he handed over his car to the third appellant at the latter's workshop in Kampala. In cross-examination the witness was shown a letter written by the Chief Magistrate transferring the witness from Mengo to Kampala a month later, September 29. The witness then said that he must have been mistaken; but subsequently he was recalled and produced a court record and a committal warrant in his handwriting which established that he was in Kampala on august 30, 1966. Following the principle established in

Golder's case (2) the Chief Justice, who tried the case, rejected the evidence of the witness in toto.

Held – the witness's evidence should have been accepted, because he had finally established that his evidence in chief was true and his evidence was therefore not nullified (*Golder's* case (2) distinguished).

As there was insufficient other evidence to support a conviction of the third appellant, his appeal was allowed.

Cases referred to in judgment:

(1) *R. v. Mwango s/o Manaa* (1936), 3 E.A.C.A. 29.

(2) *R. v. Golder* (1961), 45 Cr. App. R. 5.

Judgment

The following considered judgment of the Court was read by **Law JA:**

The six appellants in this appeal were convicted by the learned Chief Justice of robbery contrary to ss. 272 and 273 (2) of the Penal Code. They now

appeal against their convictions and sentences. The facts of the case were as follows.

On August 30, 1966 a landrover owned by Madhvani Sugar Works Ltd. was being driven from Jinja to Kakira by Jaswant Thakker, an employee of the company. Sitting next to him was Chunilal Nathwani, a cashier employed by the company, and in the back of the vehicle was an office messenger named Matia Matope. These people had been to Jinja to collect money required for the payment of wages. They had drawn from the bank the sum of Shs. 492,000/-. Of this sum, Shs. 450,000/- was in notes, which were placed in a safe in the back of the landrover, and the balance of Shs. 42,000/- consisted of coins in bags, which were also placed in the back of the landrover. At about 11.30 a.m. when some two miles from its destination at Kakira, the landrover was rammed and brought to a standstill by a Peugeot family saloon motor car travelling in the same direction. A number of men jumped out of the Peugeot. One of these men pulled Nathwani from his seat, knocked him to the ground and extracted his wallet from his hip-pocket. Thakker was able to snatch the wallet from the hand of this man, whom both Nathwani and Thakker identified at the trial as being the fourth appellant. While this was going on, some of the other men removed the safe from the landrover and transferred it to the Peugeot. All this was witnessed from a distance by the company's chief security officer, Tom Isingoma, who happened to be in a red landrover which had been stationary some 200 yards away. At first Isingoma thought that he was witnessing an ordinary traffic accident, but when he realised that a robbery was taking place he ordered his driver to drive fast to the scene. According to Isingoma, he had seen from a distance three men transfer the safe from the landrover to the Peugeot, and when he arrived at the scene he saw three men beating Nathwani who was lying on the ground. Isingoma was unable to intervene as he was threatened by a man armed with a pistol who was standing at the rear of the Peugeot. This man he identified at the trial was being the sixth appellant. Isingoma also identified the fourth appellant was being one of the men beating Nathwani, and the first appellant as standing by shouting, "take the keys from him", meaning presumably the keys of the safe. As he was threatened with a pistol, Isingoma prudently retired behind a tree. He deposed that the third appellant walked towards him, carrying a stone, and that the fifth appellant went towards his driver, Gaswaga. Gaswaga deposed that the Peugeot, after striking the landrover and bringing it to a halt, swung round so as to face the direction of Jinja. At the trial he identified the sixth appellant as being the man with the pistol. He also identified the second, fourth and fifth appellants as being amongst the robbers. He tried to block the passage of the Peugeot by driving the red landrover in its way, but there was a wide grassy verge and the Peugeot was able to get by, after all the robbers had scrambled on board, whereupon it disappeared in the direction of Jinja at high speed. The messenger Matope who was pulled out of the landrover and thrown to the ground fled into the sugar cane and was unable to identify anybody. A number of identification parades were subsequently held, attended by all the eye-witnesses. Only Isingoma picked out the first appellant. The second appellant was picked out only by Gaswaga. The third appellant was picked out only by Isingoma. The fourth appellant was picked out by Nathwani, Thakker, Isingoma and Gaswaga. The fifth appellant was picked out by Isingoma and Gaswaga, as was the sixth appellant.

The defence of all six appellants was alibi, and a number of witnesses were called to prove that each appellant was at some place other than the scene of the crime when it was committed. One of these witnesses, Sabani Tenywa, called on behalf of the first and second appellants, deposed that Isingoma had, shortly after the robbery, given him Shs. 2,000/- of the stolen money. This

man had been convicted on his own plea of receiving that money, knowing it to have been stolen, and the prosecution was allowed to call evidence in rebuttal to prove that when Tenywa was charged with that offence he made a cautioned statement to the police in which he claimed that the Shs. 2,000/- had been given to him by the first appellant and in which he did not implicate Isingoma at all. The learned Chief Justice, in his judgment, remarked with some justification that the evidence given by Tenywa in no way advanced the cause of the first and second appellants. The Chief Justice was satisfied, as were the assessors, that the witnesses Nathwani, Thakker, Isingoma and Gaswaga were truthful and reliable witnesses, and after carefully considering all the evidence given by the appellants and the witnesses called on their behalf he was left with no doubt as to the guilt of each appellant.

Mr. Kiwanuka for the appellants has argued a number of grounds on their behalf. His first ground is that there were so many discrepancies in the evidence of the prosecution witnesses as to make it completely unreliable, and he submitted that the learned Chief Justice misdirected himself in his approach to these discrepancies when he said in the course of his judgment that, in his view, "the discrepancies such as they are rather than weaken have strengthened the case for the prosecution". Taken in isolation this sentence amounts to a misdirection; the existence of discrepancies in the evidence of prosecution witnesses cannot strengthen the prosecution's case. But we are satisfied that there was in fact no misdirection when the sentence is read in its context. What the Chief Justice meant is clear from the words which follow:

> "They (i.e. the discrepancies) show that the case for the prosecution is not fabricated nor is the result of a plot against the accused as was suggested by counsel for the first and second accused and that each witness has testified to the incident as he saw it."

This ground of appeal fails.

The second ground of appeal complains that the learned Chief Justice misdirected himself in finding that Isingoma reported the name of the first appellant immediately after the incident, and that if he had appreciated this point it must have affected his view of the reliability of Isingoma's evidence and might have resulted in the first appellant being acquitted. The evidence on this point is somewhat conflicting. Mr. Patel, the general manager of Madhvani Sugar Works Ltd. to whom Isingoma first reported, had no recollection of Isingoma telling him that he knew one of the robbers, or that his name was Lwanyaga; but Assistant Superintendent of Police Mulemezi, who saw Isingoma within an hour or so of the robbery, is definite that Isingoma told him that he could recognize three of the robbers and that one was Lwanyaga. There is no reason to doubt the truth of Mr. Mulemezi's evidence, and this ground of appeal also fails.

Mr. Kiwanuka also complained that the various identification parades held in connection with this case did not comply with the conditions approved by this Court in *R. v. Mwango s/o Manaa* (1936), 3 E.A.C.A. 29, and that the procedure followed was so irregular that any identification made at these parades was valueless. There is some justification for Mr Kiwanuka's complaints, in particular that the other persons on the parade were not of "similar age, height, general appearance and class of life" as the accused, to quote from *Mwango's* case. On one occasion, the ages of the volunteers on parade ranged from 19 to 48 years, and on another occasion, their ages ranged from 19 to 40 years. It is, of course, not easy always to recruit volunteers who are of similar age, height and general appearance to the accused in every case, but we agree with Mr Kiwanuka that the disparity in ages which occurred in the parades referred to above was most unsatisfactory. Nevertheless most of the

appellants had no complaints as to the way their parades were conducted; on several occasions persons were picked out who were not connected with the robbery, which disposes of any suggestion that the appellants were pointed out to the witnesses. All volunteers on the parades were dressed as far as possible in clothes similar to those worn by the suspects. After careful consideration of all the evidence relating to the conduct of the parades, we see no reason to differ from the learned Chief Justice's view that the procedure followed by the police was on the whole reasonably in accordance with requirements laid down in *Mwango's* case.

The fifth ground of appeal complained that the appellants had not had a fair trial. Mr Kiwanuka informed us that he was not proceeding with this ground. The appellants, we are satisfied, had the benefit of a very full and impartial trial, which extended over a period exceeding a month.

The only other ground of appeal which we consider to be of substance is ground 11, which reads as follows:

> "That the learned judge ought not to have disregarded the evidence of D.W. 11 Mr. J. B. Kafero for the reasons he gave, but ought to have held that the production of the court records which showed that he worked in Kampala on August 29, 1966 confirmed rather than nullified his evidence."

Mr. Kafero is a magistrate. He was called as a witness in support of the third appellant's alibi. His evidence was to the effect that he was transferred from Mengo to Kampala on August 29, 1966, and that on the following day he handed over his car to the third appellant at his workshop for repair at 8 a.m. and that he collected it from the third appellant at 4 p.m. In cross-examination Mr. Kafero was shown a letter addressed to him by the Chief Magistrate ordering him to leave his post at Mengo and to assume duty in Kampala on September 29, 1966. Faced with this letter, Mr. Kafero said that he must have been mistaken in his evidence in chief, and that it was on September 29, and not August 29, that he came to Kampala from Mengo. Mr. Kafero gave evidence on February 6, 1968. Three days later he was recalled, by leave of the court, and produced a court record and a committal warrant bearing his handwriting and signature which proved conclusively that he had sat as a magistrate in Kampala on August 30, 1966. Nevertheless the learned Chief Justice rejected Mr. Kafero's evidence in toto. He said:

> "On the principle established in *R. v. Golder*, 45 Cr. App.R. 5, that where a witness is shown to have made a statement inconsistent with his evidence given at the trial the jury should not merely be directed that his evidence given at the trial should be disregarded as unreliable but should also be directed that his previous statement whether sworn or unsworn does not constitute evidence on which they can act. It is impossible to accept and act on the evidence given by John Beptist Kafero. . . . In my view the production and tendering of those records (i.e. the court record and committal warrant) amounted to treating the witness as hostile and therefore nullified his evidence."

With great respect, we are of the opinion that the learned Chief Justice erred in considering Mr Kafero's evidence as "nullified" for the reasons given by him. *Golder's* case was concerned with a witness who had told one story to the committing magistrate, and a different story at the trial. The position here was very different. Mr Kafero had deposed that he was in Kampala on a certain date, and when shown a letter in cross-examination, he was forced to admit that he must have been mistaken and that he in fact came to Kampala a month later. He was recalled, and produced court records, not to discredit

him or treat him as a hostile witness, but to show that his evidence in chief had been true. Far from "nullifying" the whole of his evidence, this had in our opinion the effect of showing that Mr. Kafero had been a truthful witness. Mr. Deobakhta for the State conceded that the learned Chief Justice had rejected Mr. Kafero's evidence for erroneous reasons, but submitted that even if Mr. Kafero's evidence was accepted, it would not avail the third appellant, as it gave him no alibi for the time of the robbery. That may be so, but there is another aspect of the matter to be considered. The learned Chief Justice formed such an unfavourable view of Mr. Kafero as a witness that this must have affected his approach to the general question of the third appellant's innocence or guilt. The calling of a perjured witness by an accused person is a strong indication of guilt. The case against the third appellant was not particularly strong. He was only identified by Isingoma, who was at the time he saw him hiding behind a tree. Isingoma agreed in cross-examination that he could not see the third appellant clearly, "as it all happened very quickly". We cannot say for certain that the third appellant would have been convicted had the Chief Justice not rejected the evidence of his witness Mr. Kafero for erroneous reasons. We do not think it would be safe to allow his conviction to stand. We accordingly allow his appeal, quash his conviction and set aside the sentence passed on him. As regards the other appellants, we have carefully considered the evidence against each one. The learned Chief Justice and the assessors believed this evidence, and we see no reason to come to a different conclusion. The sentences passed on them are not excessive. The appeals of the first, second, fourth, fifth and sixth appellants are dismissed.

Order accordingly.

For the appellants:
BKM Kiwanuka
Kiwanuka & Co, Kampala

For the respondent:
AG Deobhakta (State Attorney, Uganda)
Attorney-General, Uganda

Kiwelesi v Republic
[1969] 1 EA 227 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	29 November 1968
Case Number:	121/1968 (181/68)
Before:	Sir Clement de Lestang Ag P, Duffus Ag V-P and Spry JA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanzania – Georges, C.J

[1] Court – Constitution of – Woman assessor in criminal case – Court not properly constituted.

[2] Criminal Practice and Procedure – Assessors – Woman – One of two assessors was a woman – Court had no jurisdiction to try a murder case – Criminal Procedure Code (*Cap.* 20), *ss.* 250 *and* 254 (*T.*).

Editor's Summary

The appellant was convicted of murder by the High Court of Tanzania and sentenced to death by a court which consisted of the Chief Justice sitting with two assessors, one of whom was a woman. Section 25 of the Criminal Procedure Code provides that only male persons are liable to serve as assessors. The Court of Appeal of its own motion raised the question whether the trial court had been properly constituted.

Held –

(i) only male persons between the ages of twenty-one and sixty are eligible to sit as assessors; and therefore the court was improperly constituted since in law it was sitting with one assessor only;

(ii) there had been no lawful trial before a lawfully constituted tribunal and the trial was a nullity.

Conviction and sentence set aside and a trial de novo before a court of competent jurisdiction ordered.

Cases referred to in judgment:

(1) *R. v. Assa Singh* (1937), 4 E.A.C.A. 41.

(2) *King-Emperor v. Tirumal Reddi* (1901), 24 Mad. 523.

(3) *R. v. Romani bin Mwakiponya* (1937), 4 E.A.C.A. 62.

(4) *R. v. Yowasi s/o Paulo* (1939), 6 E.A.C.A. 126.

(5) *Joseph Kabui v. R.* (1954), 21 E.A.C.A. 260.

(6) *Laurenti Busolo s/o Makumba v. R.*, [1957] E.A. 298.

(7) *Emperor v. Man Singh* (1913), 35 I.L.R. (All.) 570.

Judgment

The following considered judgment of the Court was read by **Spry JA:**

The appellant was convicted of murder by the High Court of Tanzania and sentenced to death, and he has appealed to this Court. At the hearing of the appeal, we thought it proper to raise, of our own motion, the question whether the trial court had been properly constituted. It consisted of the learned Chief Justice, sitting with two assessors, one of whom was a man and one a woman. So far as we are aware, this is the first time that a woman has sat as an assessor at any trial in Tanzania or, indeed, in East Africa.

Section 250 of the Criminal Procedure Code (Cap. 20) provides that, subject to certain exemptions,

> "all male persons between the ages of twenty-one and sixty years shall be liable to serve as assessors".

The reference to male persons is explicit and we may say at once that in our opinion this is clearly not a context in which it is possible to invoke the provision in the Interpretation and General Clauses Ordinance (Cap. 1) which in appropriate circumstances permits words importing the masculine gender to be interpreted to include females.

We may say also that we are not aware of any constitutional provision which would override s. 250.

Mr Borneo, who appeared for the Republic, argued that s. 250 relates only to liability to serve and submitted that neither that section nor any other provision of the Code relates to eligibility. He conceded that s. 254 (2) requires the magistrate, whose duty it is to summon assessors, to select

> "persons whom he considers to be suitable and to be liable . . . to serve as assessors"

but he argued that if a magistrate erroneously summonses some person who is not liable to serve, the only result is that that person has the right to apply under s. 255A for his discharge, a right which he may or may not exercise. Mr Borneo also sought to rely on the unqualified use of the words "any person" in s. 258 (1).

With respect, we cannot accept Mr Borneo's submission. We think, reading together ss. 250 and 254, that the only reasonable interpretation is that only male persons between the ages of twenty-one and sixty are to be summoned and that this must mean that only such persons are eligible to sit as assessors. For any other person to be summoned would be contrary to the express requirement of the Code.

In the present case, only two persons were selected by the court as assessors and if, as we think, one of them was ineligible, it means that, in law, the learned Chief Justice was sitting with one assessor only. Although this particular situation has not arisen previously, there is a line of authorities which leave no doubt that in such circumstances the court is not duly constituted and lacks jurisdiction. In *R. v. Assa Singh* (1937), 4 E.A.C.A. 41, where an assessor, after being absent for a day, was allowed to resume and to express an opinion, this Court, expressly disagreeing with the judgment of the High Court of Madras in *King-Emperor v. Tirumal Reddi* (1901), 24 Mad. 523, held that the court ceased to be a court of competent jurisdiction in the absence of the assessor. This decision was followed in *R. v. Romani bin Mwakipanga* (1937), 4 E.A.C.A. 62. Again in *R. v. Yowasi s/o Paulo* (1939), 6 E.A.C.A. 126, where certain evidence was recorded after the assessors had expressed their opinion, this Court, holding the trial to be a nullity, observed:

> "The assessors are an essential part of the court and the court was not a court of competent jurisdiction in their absence."

The decision in *Assa's* case was upheld in *Joseph Kabui v. R.* (1954), 21 E.A.C.A. 260, when this Court reiterated that this was not a curable irregularity. Again, in *Laurenti Busolo s/o Makumba v. R.*, [1957] E.A. 298, it came to light that one of the assessors was disqualified by reason of a personal connection with the case; the trial judge discharged him and proceeded with the trial with the aid of the other two assessors; it was held by this Court that the trial was a nullity, because the only cases in which the court may proceed without one of the assessors are those expressly provided for by statute.

Mention may also be made of one Indian case (other cases referred to in the

textbooks are not available to us); that is the case of *Emperor v. Man Singh* (1913), 35 I.L.R. (All.) 570. In that case, the trial court sat with two assessors, only one of whom had been properly summoned. The appellant court, following an earlier decision, held the trial to have been a nullity, remarking that

> "In such a case there has been no lawful trial before a lawfully constituted tribunal."

In the light of these authorities, we think, with respect, that the trial was a nullity and that we must therefore quash the conviction of the appellant, set aside the sentence of death passed on him and direct that he be tried de novo before a court of competent jurisdiction. It is so ordered.

Order accordingly.

The appellant did not appear and was not represented.

For the respondent:
JE Borneo (State Attorney, Tanzania)
Attorney-General, Tanzania

RS v SS and another
[1969] 1 EA 229 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	7 September 1968
Case Number:	40/1966 (128/68)
Before:	Harris J
Sourced by:	LawAfrica

[1] Marriage – Nature of marriage created by ceremony under Marriage Act (*Cap.* 150) (*K.*).

[2] Marriage – Validity – Ceremony under the Marriage Act (*Cap.* 150) (*K.*) *by husband already married but who could have contracted a valid polygamous marriage.*

[3] Matrimonial Causes – Adultery – Hindu marriage – Whether subsequent civil marriage to and cohabitation with another woman is adultery by husband – Hindu Marriage and Divorce Act (*Cap.* 157), *s.* 10 (1) (*a*) (*K.*).

Editor's Summary

The petitioner and the respondent, who were both Sikhs, married by Sikh ceremony in December, 1957, and this was a valid marriage under the Hindu Marriage, Divorce and Succession Ordinance (Cap. 149). It was also at that time a potentially polygamous union since the respondent husband could have married a second wife by a Sikh ceremony. In November, 1958 the respondent went through a civil ceremony of

marriage with the co-respondent in purported pursuance of the Marriage Ordinance (Cap. 144) (now the Marriage Act (Cap. 150)). The wife petitioned for divorce on the ground of the husband's adultery with the second "wife".

Held –

(i) only a monogamous marriage can be created by a ceremony under the Marriage Act;

(ii) as the husband was already married, the ceremony was invalid and created no marriage status;

(iii) therefore the respondent had committed adultery with the co-respondent.

Decree nisi granted.

Cases referred to in judgment:

(1) *Ayoob v. Ayoob*, [1968] E.A. 72.

Judgment

Harris J: This is a petition for the dissolution of the marriage between the petitioner and the respondent which took place on December 8, 1957 at Nairobi in accordance with rites and ceremonies customary in Kenya among persons professing the Sikh religion. The parties were then and are now adherents of that religion, and the marriage, I am satisfied, constituted a valid marriage under the Hindu Marriage, Divorce and Succession Ordinance (Cap. 149 of the Laws of Kenya, 1948 edition) which was then in force.

Although not so intituled, the petition clearly purports to have been presented under the provisions of the Hindu Marriage and Divorce Act (Cap. 157 of the Laws of Kenya, 1962 edition) which replaces the matrimonial provisions of Cap. 149 already referred to and which in its long title is stated to be "an Act to regulate the marriage of, and provide for matrimonial causes between, Hindus and persons of allied religions", and in which the word "Hindu" by definition includes a person who is a Sikh by religion.

I find on the evidence that the respondent has become and is now domiciled in this country and that the petitioner as his wife enjoys a similar domicil.

The ground for divorce relied upon by the petitioner at the hearing was the alleged adultery of the respondent with the co-respondent and I am satisfied that the petitioner has neither connived at nor condoned the alleged adultery. Although the respondent himself gave evidence under subpoena upon which my finding as to domicil is made I am satisfied that the petition has not been presented or prosecuted by the petitioner in collusion with either the respondent or the co-respondent.

There remains the question as to whether the acts complained of by the petitioner constitute the matrimonial offence of adultery for the purpose of these proceedings. It has been established in evidence which I accept that on November 20, 1958, which was less than one year after his marriage to the petitioner, the respondent went through a civil ceremony of marriage (to which I will refer as "the second marriage") in the office of the district commissioner at Mombasa with the co-respondent, that he has since lived and continues to live with her as man and wife, and that two children have been born of that union. The problem is as to whether this consummation of the second marriage can properly be said to have constituted an act of adultery on the part of the respondent, within the meaning of s. 10 (1) (*a*) of the Hindu Marriage and Divorce Act, having regard to the degree of recognition which that Act affords to plural or non-monogamous marriages contracted before it came into operation.

The Act came into force on July 19, 1960, and s. 10 (1) (*a*) declares that the commission of adultery subsequently to the celebration of the marriage by either party to the marriage is a ground upon which the other party may present a petition for divorce. By para. (i) of s. 10 (1) it is provided that, in the case of a marriage solemnized before the commencement of the Act, the wife may petition for divorce from the husband on the ground either that at the time of the marriage he was already married or that after the marriage but before the commencement of the Act he had married again, provided in either case that the person to whom the Act refers as "the other wife" was living at the date of the petition. This provision clearly contemplates the legal possibility

of the existence contemporaneously of two separate marriage by a Hindu husband, each to a separate wife and each marriage valid under the Act. Can it be said, then, that in such a case the physical consummation of the later marriage confers upon the wife by the earlier marriage a right under s. 10 (1) (*a*) to seek a dissolution of her marriage on the ground of adultery?

Counsel for the petitioner contended that in the present case the later marriage, which I am satisfied was celebrated in purported pursuance of the Marriage Ordinance (Cap. 144 of the Laws of Kenya, 1948 edition) rather than of the Hindu Marriage, Divorce and Succession Ordinance, was invalid, and therefore that the degree of recognition to be afforded to a later marriage during the subsistence of an earlier marriage is irrelevant. The basis of his argument was that the Marriage Ordinance, which was enacted originally in 1902, contemplates only monogamous marriages, as is pointed out by De Lestang, V.-P. in *Ayoob v. Ayoob*, [1968] E.A. 72, and therefore that a person who was already a party to a subsisting marriage celebrated according to the Hindu Marriage, Divorce and Succession Ordinance could not have contracted under the Marriage Ordinance a valid marriage to a third person.

This contention would seem to be correct, with the result that what I have referred to as the second marriage did not create a valid matrimonial union so as to prevent the physical relationship which followed it from being, on the part of the respondent, adulterous. This conclusion is based, as was counsel's argument, upon the strictly monogamous nature of the marital relationship created by a marriage under the former Marriage Ordinance, now the Marriage Act (Cap. 150), and I express no opinion as to what might have been the position here had the second marriage been celebrated otherwise than under the Marriage Ordinance.

For these reasons I am satisfied that the adultery alleged by the petitioner to have been committed by the respondent has been established and that the petition succeeds.

I might perhaps add that, conversely, if the second marriage had in law constituted a valid marriage, then, since both marriages had taken place before the commencement of the Hindu Marriage and Divorce Act, the effect of s. 10 (1) (i) of that Act would have been to entitle the petitioner to seek a divorce provided that the co-respondent was living at the date of the presentation of the petition and irrespective of any question of adultery.

I grant the petitioner a decree nisi for the dissolution of the marriage between her and the respondent, together with the costs of the proceedings to be paid by the respondent when taxed. The petitioner did not press for the relief claimed in the petition against the co-respondent and no order is made in that behalf.

Decree accordingly.

For the petitioner:
P le Pelley and *GS Sandhu*
GS Sandhu & Co, Nairobi

For the respondent:
Swaraj Singh, Nairobi

For the co-respondent:
Gautama & Gautama, Nairobi

The respondent and the co-respondent were not represented.

Muhuri and others v Kiriu and others
[1969] 1 EA 232 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	13 December 1968
Case Number:	28/1968 (183/68)
Before:	Sir Charles Newbold P, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Rudd, J

[1] Contract – Illegality – Transport licensing – Whether partnership illegal where only one partner licensed.

[2] Partnership – Illegality – Whether partnership is illegal if one of the partners licensed in person under the Transport Licensing Act registers a motor bus in his own name and operates a transport service on behalf of the partnership – Transport Licensing Act (*Cap.* 404), *ss.* 4 (1) (*b*) *and* 5 (5) (*a*) (*i*) (*K.*).

[3] Transport Licensing – Ownership of bus – Partnership – One partner licensed and bus operated by him in his name on behalf of partners – Whether arrangement in contravention of Transport Licensing Act, ss. 4, 5, 12 *and* 14.

Editor's Summary

In 1959 one Muhuri obtained a road service licence under the Transport Licensing Act. He then purchased a motor bus with monies contributed by a number of other persons. Each person in proportion to his contribution was to receive a share of the profits from operating the motor bus, which was registered in the sole name of Muhuri. After a while the bus was sold and another bus was purchased with the proceeds of the sale and with additional contributions from the original contributors. For the purpose of this appeal it was accepted by all the parties that there existed a partnership with Muhuri and the contributors as partners and it was assumed the bus was partnership property. A dispute arose among the partners, and some of the partners brought an action against Muhuri and others seeking a dissolution of the partnership with the taking of an account. Muhuri and the other defendants contended as a preliminary issue that as the licence was in Muhuri's name alone the partnership was illegal. In the High Court it was held that Muhuri carried on the business in his name subject to equities in favour of all partners, and the partnership was lawful and capable of being performed without illegality. From this decision Muhuri and the other defendant partners appealed. It was submitted by the appellants that (i) the partnership was illegal; (ii) if the partnership was lawful then by virtue of the provisions of ss. 4 (1) (*b*) and 5 (5) (*a*) (i) of the Transport Licensing Act, the terms of the partnership could not be carried out without contravening the Act.

Held –

(i) there is nothing illegal in an agreement to purchase a bus and to operate a transport service under a road service licence;

(ii) there was no contravention of s. 4 of the Act by virtue of the fact that Muhuri, the holder of the road service licence, operated the business on behalf of the partnership (*Mwangi v. Mwangi* (1) overruled);

(iii) there was no contravention of s. 5 of the Act by virtue of the fact that Muhuri was the registered owner of the bus. The bus was operated subject to the equities of the partnership;

(iv) there was no illegality.

Appeal dismissed.

Cases referred to in judgment:

(1) *Mwangi v. Mwangi* (Kenya High Court Civil Case No. 1303 of 1961) (unreported).

December 13, 1968. The following considered judgments were read:

Judgment

Sir Charles Newbold P: In 1959 Godfrey Muhuri applied for a road service licence under the Transport Licensing Act (hereinafter referred to as the Act), and his application was approved. At that time he owned no motor bus. He invited a number of other persons to contribute money for the purchase of a bus which was to be used in providing a transport service under the road service licence on the understanding that the persons who made such contributions were each to receive a proportionate share of the profits. It was also agreed that he was to manage the transport business, though some of those other persons performed some duties in that business. It is now accepted by all parties that this arrangement resulted in a partnership, with all the contributors and Godfrey Muhuri being the partners. It is not clear whether the bus which was purchased was partnership property, but without deciding such to be the position I shall assume it was so for the purposes of this judgment.

Following the arrangement I have referred to, a bus was purchased and registered in the name of Godfrey Muhuri and a road service licence was issued in the name of Godfrey Muhuri. This transport business was operated and some time later the original bus was sold and the proceeds from the sale, together with additional contributions from the partners, were used to buy another bus which was again registered in the name of Godfrey Muhuri. Subsequently a dispute arose between the partners, and an action was brought by some of them against Godfrey Muhuri and the remaining partners, seeking, *inter alia*, an order that the partnership be dissolved and that the accounts of the partnership be taken and that all assets of the partnership be sold. Godfrey Muhuri and the other defendants entered a defence. Paragraph 9 of the defence contended that the partnership was entered into to carry on the transport business without obtaining a licence in the name of all the partners or without obtaining the prior consent to the transfer of the licence issued to Godfrey Muhuri and, consequently, that the partnership agreement could not be performed without a contravention of the provisions of the Act and that the agreement was therefore void for illegality.

When the matter came before Rudd, J. in the High Court it was agreed that the question of illegality raised by the defence should be dealt with as a preliminary issue. Evidence was taken and Rudd, J., ruled that Godfrey Muhuri was in law the owner of the bus and the holder of the road service licence and that under the arrangement he owned the bus and operated the transport business subject to equities in favour of all the partners. The judge also held that there was nothing in the contract resulting from the arrangement which was illegal in itself, nor was it a contract which could not be legally performed; accordingly, he held that that ground of defence failed. From that decision Godfrey Muhuri and the other defendant partners have appealed.

On appeal it was not at first suggested that the partnership agreement was itself illegal, but in the end that point was made. I see nothing in the evidence or in the law which would lead me to differ in any way from the decision of Rudd, J. that the partnership agreement was not an illegal agreement. The terms of the partnership agreement were not precise but were general. In my view there is no reason whatsoever to hold that an agreement between a number of persons to purchase a bus and to operate a transport service

under a road

service licence is an illegal agreement. Accordingly, that ground of appeal fails.

It was also urged by Mr Nowrojee, who appeared for the appellants, that the partnership agreement was one which, while legal in itself, could not be performed in any manner other than one contrary to the terms of the Act and, accordingly, that the agreement was one which would not be enforced by the courts. Mr Nowrojee accepted that there was a presumption in favour of legality and that the onus of proof of illegality lay on him as he was alleging illegality, but he submitted that by virtue of the provisions of s. 4 of the Act the agreement could not be performed in a legal manner. In support of his submission he referred to the decision of Miles, J. in the unreported case of *Mwangi v. Mwangi* (Kenya High Court Civil Case No. 1303 of 1961), in which it was held, on facts which are in all material respects indistinguishable, that the partnership agreement could not be carried out without infringing the provisions of the Act. Rudd, J., having considered the decision in that case, came to the conclusion that it was wrong and declined to follow it. Mr Nowrojee submitted that Rudd, J., was in error in so deciding and the basis of his argument was as follows.

Under s. 4 (1) (*b*) of the Act it is provided that

> "No person shall, except under and in accordance with the terms of a licence . . . for hire or reward convey any person by means of any motor vehicle . . ."

and under s. 5 (5) (*a*) (i) it is provided that

> "The vehicles authorised to be used under a licence shall be such motor vehicles, being vehicles belonging to the holder of the licence . . ., as are specified in the licence."

Mr Nowrojee submitted that as the transport business was carried on by the partnership and as the road service licence was in the name of Godfrey Muhuri alone the partnership agreement could not be carried out without infringing s. 4 (1) (*b*), because the person carrying on the transport business, that is conveying other persons for hire or reward in a motor vehicle, was the partnership which was not licensed. He also submitted that the bus did not belong to Godfrey Muhuri as it was partnership property under the partnership agreement, and, consequently, that the partnership agreement could not be carried out without contravening s. 5 (5) (*a*) (i), because the vehicle which was used under the licence did not belong to Godfrey Muhuri, who was the holder of the licence.

On both these points Rudd, J. held that the partnership agreement could be carried out without contravening the sections in question. He held on the first point that it was Godfrey Muhuri, the holder of the road service licence, who was in fact operating the service on behalf of the partnership, that this position was specifically permitted under the terms of the partnership agreement, and, consequently, that as Godfrey Muhuri was the person licensed and the person operating the transport business no contravention of s. 4 was caused by the partnership agreement.

I see no reason to disagree with Rudd, J. either on the facts or the law. The evidence satisfies me that Godfrey Muhuri was, with the agreement of the partners, to manage the transport business. The mere fact that some of the other parties performed duties in the transport business did not result in Godfrey Muhuri ceasing to be the manager. As manager he would operate the transport business on behalf of the partnership. In effect he would be the person responsible for conveying the passengers under the licence and he would be the person

to whom the Transport Licensing Board would look for the proper compliance with the terms of the licence. Like the judge I do not think that such a position would involve a contravention of s. 4 (1) (*b*).

The position might well be different if Godfrey Muhuri in fact had not been managing the transport business; but I cannot see why merely because a person, who manages a transport business under a licence given to him, takes a partner, the continued operation of the transport business contravenes the provisions of s. 4 (1) (*b*). Mr. Nowrojee accepted, and I am quite sure that he was right in so doing, that in such circumstances and in the circumstances of the present case there had been no contravention of s. 12. The taking by the manager of a transport business of partners does not amount to the transfer or sale of the business for the purposes of ss. 12 or 14.

On the second point Rudd, J. held that as the bus was registered in the name of Godfrey Muhuri the bus, in law, belonged to him subject to the equities arising under the partnership agreement and, accordingly, that no contravention of s. 5 (5) (*a*) (i) had been committed as, for the purposes of that section, the bus authorized to be used under the transport licence belonged to the holder of the licence.

Again, I see no reason to differ from Rudd, J. The bus was registered in the name of Godfrey Muhuri and thus even if it was partnership property I consider that it belonged to Godfrey Muhuri, the holder of the licence, for the purposes of s. 5 (5) (*a*) (i). I see nothing in ss. 16 and 17 and the Regulations made under the Act which lead me to the view that the partnership agreement could not be carried out without contravening the provisions of the Act and the Regulations made under the Act.

For these reasons I consider the decision of Rudd, J. to be correct and that of Miles, J. in *Mwangi v. Mwangi* (*supra*) to be incorrect and that the decision of Miles, J. should be overruled. Accordingly I would dismiss the appeal with costs. As the other members of the Court agree it is so ordered.

Duffus JA: I agree.

Spry JA: I agree.

Appeal dismissed.

For the appellants:
EP Nowrojee
Nowrojee and Nowrojee, Nairobi

For the respondents:
AW Sheikh
Sirley and Co, Nairobi

Yozefu and another v Uganda

[1969] 1 EA 236 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	23 December 1968
Case Number:	135/1968 (2/69)

Before: Duffus, Spry and Law JJA

Sourced by: LawAfrica

Appeal from: High Court of Uganda – Sir Udo Udoma, C.J

[1] Criminal Practice and Procedure – Charge – Defect – Whether charge is defective if it contains a wrong ingredient of the offence or omits an essential ingredient – Game (*Preservation and Control*) *Act* (*Cap.* 226), *s.* 14 (*U.*).

[2] Game – Office – Charge – Unlawful possession of trophy – Ingredients of offence – Particulars required in charge – Game (*Preservation and Control*) *Act* (*Cap.* 226), *s.* 14 (*U.*).

Editor's Summary

Section 14 of the Game (Preservation and Control) Act reads:

> "It shall be an offence for any person to possess any live animal or any trophy, flesh or any other part of any animal which has been killed, captured, appropriated or obtained in contravention of this Act unless such animal or thing has been disposed of under the provisions of this Act by order of the Minister."

Two accused were charged (in the Statement of the Offence) as follows:

> "POSSESSION OF TROPHY WITHOUT LICENCE, contrary to section 14 and 90 of the Game (Preservation and Control) Act."

The particulars of the charge were that the accused (on a certain date and at a certain place) were found in possession of trophies without a valid licence from the Chief Game Warden, to wit seventeen drums made out of zebra skins and forty-seven pieces of zebra skins. The accused pleaded guilty, were fined and the fines were paid. On appeal to the High Court on the grounds that the charge was defective the appeals were dismissed by the Chief Justice. On further appeal to the Court of Appeal it was submitted the charge was defective and the Chief Justice was wrong to have held that (i) reference to a licence was mere surplusage and (ii) the offence was complete once a person is in possession of a trophy.

Held (by a majority) –

(i) the Act creates a number of offences and the charge should make it clear which offence is alleged;

(ii) section 14 makes it an offence to be in possession of the skin of an animal killed, captured, appropriated or obtained in contravention of the Act, and the words "in contravention of the Act" relate to the killing, capture, and appropriation of the animal, not to the possession of a trophy;

(iii) the charge was defective in that it did not allege an essential ingredient of the offence, i.e. that the skins came from animals killed etc., in contravention of the Act.

Appeal allowed and finding and sentences set aside. Fines to be refunded.

No cases referred to in judgment

Judgment

The following considered judgment of the majority of the Court (Spry and Law, JJ.A.) was read by **Spry JA:**

The two appellants were charged in the court of the Chief Magistrate, Masaka, with the joint commission of an offence against s. 14 of the Game (Preservation and Control) Act (Cap. 226). Pleas of guilty were entered and each appellant was fined the sum of Shs. 1,500/-. We are informed that these fines have been paid. Other charges were withdrawn and we are not concerned with them.

The appellants appealed against their conviction to the High Court but their appeals were dismissed and they now appeal to this Court. The basis of the appeals to this Court is, as it was in the High Court, a submission that the charge on which the appellants were convicted was so defective that any proceedings springing from it were a nullity. There were other grounds of appeal in the High Court but they have not been pursued here.

It may be convenient to begin by setting out the provisions of s. 14. It reads as follows:

> "It shall be an offence for any person to possess any live animal or any trophy, flesh or any other part of any animal which has been killed, captured, appropriated or obtained in contravention of this Act unless such animal or thing has been disposed of under the provisions of this Act by order of the Minister."

In the charge sheet, the Statement of Offence reads as follows:

> "POSSESSION OF TROPHY WITHOUT LICENCE, contrary to section 14 and 90 of the Game (Preservation and Control) Act."

Mr Kiwanuka began by attacking this Statement, on the ground that the section contains no reference to a licence. The Particulars of Offence read as follows:

> "Eremegio Kawesa and Joseph Ndawula, on the 2nd May, 1968, at Masaka Township in Masaka District were found in possession of trophies without a valid licence from Chief Game Warden to wit seventeen drums made out of Zebra skins and forty-seven pieces of Zebra skins."

This again was attacked by Mr Kiwanuka. He submitted that the lack of a licence from the Chief Game Warden is not a constituent of the offence created by s. 14; indeed, although the Chief Game Warden has power to issue licences for certain purposes, he has no power to absolve an offence under the section. Moreover, the particulars omit what is an essential ingredient, that is, that the trophy, possession of which is alleged, must be

> "of any animal which has been killed, captured, appropriated or obtained in contravention of this Act."

These arguments had been advanced before the learned Chief Justice, who held that the inclusion of the reference to a licence from the Chief Game Warden was mere surplusage. He held also that it was unnecessary to include in the charge an allegation that the skin was that of an animal which had been killed, captured, appropriated or obtained in contravention of the Act. He said that

> "the offence is complete once a person is in possession of a trophy."

Once that was alleged, the onus shifted, by virtue of s. 23, to the accused person to prove that the trophy was lawfully obtained.

With great respect, we cannot agree. The Act creates a number of offences and it is, we think,

essential for the charge to make it clear which is alleged. The fact that some of these offences appear to overlap makes it more, rather

than less, important for charges to be drawn with precision. We think that the true interpretation of the wording of s. 14 is that that section only makes it an offence to be in possession of the skin of an animal if that animal was killed, captured, appropriated or obtained in contravention of the Act, which means that the animal must have been killed, captured, appropriated or obtained in Uganda. In contrast, s. 25 deals with possession without that qualification, but is limited to scheduled animals, dead or alive, or any part of a scheduled animal. Other sections of the Act (e.g. ss. 10 and 16) prohibit or regulate the sale or purchase, export or import of animals and trophies and these sections apply (obviously as regards importation) whether or not the animal was so killed, captured, appropriated or obtained.

Mr Khan, who appeared for the Republic, sought to support the judgment of the learned Chief Justice by arguing, if we understood him correctly, that s. 14 should be read as if it provided that it should be an offence to possess, in contravention of the Act, any live animal, etc. But the section does not say that and in our view such an interpretation would accord neither with grammar nor with logic. We think it is quite clear that the words “in contravention of this Act” relate to the killing, capture, appropriation or obtaining of the animal, not to the possession of a trophy. Mr Khan also argued that the section might be read as making it an offence to possess any trophy obtained in contravention of the Act, but, for the same reason, we would reject that interpretation also. In any case, a trophy obtained in Kenya and illegally imported into Uganda would not have been obtained in contravention of the Act.

The question of onus of proof does not arise until after a proper charge has been laid and a plea taken on it. Whether or not the onus of proof is then on the accused person cannot be relevant to the question whether the charge itself is defective. Incidentally, the provisions regarding the onus of proof are different according to whether the charge is possession or importation (see ss. 23 and 24).

It is fundamental that every charge should allege all the essential constituents of an offence. In the present case, where an offence against s. 14 was charged, we think that the allegation that the pieces of skin came from an animal killed in contravention of the Act was an essential ingredient, and that its omission makes the charge defective.

Mr Khan submitted that even if the charge were defective, no injustice had resulted, as it was clear the appellants had known and understood what was the allegation against them. Here, again, we cannot agree. It is apparent from the record that the appellants’ defence, had they been properly charged and tried, would have been that the trophies in question had been bought lawfully in Kenya. If they could have proved that, they would have had a good defence to a charge under s. 14. The defect was, therefore, most material. It may be that the appellants were guilty of some other offence, but that does not concern us. It may be, also, that the fact that the appellants appeared to have pleaded guilty to a charge under s. 14 led the prosecution to withdraw another, probably more appropriate, charge. However, that was the prosecution’s mistake and does not affect this appeal.

The appeal is allowed, the convictions of the appellants are quashed and the sentences passed on them set aside and it is ordered that the fines paid be refunded to them.

Appeal allowed.

For the appellants:
BKM Kiwanuka
Kiwanuka & Co, Kampala

For the respondent:
AM Khan (State Attorney, Uganda)
Attorney-General, Uganda

Edmund Schluter & Co (Uganda) Ltd v Patel
[1969] 1 EA 239 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	20 December 1968
Case Number:	41/1968 (4/69)
Before:	Duffus, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda at Kampala – Phadke, Ag. J

[1] Agency – Ostensible authority – Sale of property – Special agent to sell property – Agent put in possession of duplicate certificates of title by the principal – Whether such agent has apparent authority to receive money on behalf of the principal.

Editor's Summary

The appellant company bought certain land from the respondent, on whose behalf the sale had been negotiated by one G. The company paid the deposit of Shs. 50,000/- to G. and, subsequently, paid the balance of the purchase price to the respondent direct. G. failed to account for the Shs. 50,000/- and disappeared. The respondent sued the appellant company for Shs. 50,000/-, claiming that G. had no authority to receive money on the respondent's behalf. The respondent had released the duplicate certificates of title to G. who had handed them over to the company against payment of the deposit. The respondent's claim having succeeded in the High Court, the appellant appealed.

Held –

(i) the test of ostensible authority was what an ordinary person dealing with an agent could reasonably assume, in the absence of any notice to the contrary, to be his authority;

(ii) a purchaser dealing with the agent for a named principal, who purported to have an unfettered discretion to conclude a binding contract and who was prepared to hand over the duplicate certificates of title against payment of a deposit, was entitled to assume that the agent had authority to receive a deposit;

(iii) the receipt of the deposit was within the ostensible authority of G.

Appeal allowed with costs.

Cases referred to in judgment:

(1) *Mynn v. Joliffe* (1834), 1 M. & Rob. 326; 174 E.R. 112.

(2) *Drakeford v. Piercey* (1866), 7 B. & S. 515; 14 L.T. 403.

(3) *Butwick v. Grant*, [1924] 2 K.B. 483.

(4) *Ryan v. Pilkington*, [1959] 1 All E.R. 689.

December 20, 1968. The following considered judgments were read:

Judgment

Spry JA: This is an appeal from a judgment and decree of the High Court of Uganda. The appellant company bought certain land from the respondent, the sale having been negotiated on behalf of the respondent by one of his acquaintances, to whom I shall refer as Ghanshyam. The company paid a deposit of Shs. 50,000/- to Ghanshyam and subsequently paid the balance of the purchase price. According to the respondent, Ghanshyam failed to account for the Shs. 50,000/- and his whereabouts are unknown. The respondent asserted that Ghanshyam had no authority to receive money on his behalf and claimed the Shs. 50,000/- from the company. The company refused to pay. The respondent then sued the company for that amount and obtained judgment and it is against that decision that this appeal is brought.

The learned judge based his decision on findings of fact, that the respondent had not conferred express authority on Ghanshyam to receive money on his behalf and that Ghanshyam was a special agent; on a finding of law, that as a special agent, Ghanshyam had no implied authority to receive money; and on a finding that "there was nothing in the circumstances to show that the defendant had reason to construe the acts of Ghanshyam as acts of apparent authority possessed by him".

It was not seriously argued that the learned judge was wrong in his findings of fact that no express authority had been conferred on Ghanshyam and that Ghanshyam was a special agent. The main argument centred on the question whether he had implied or ostensible authority to receive money.

I would agree with the learned judge that Ghanshyam's position as a special agent did not carry with it any implied authority to receive money. With respect, however, I cannot agree with him on the question of apparent or ostensible authority.

In deciding that there was no such ostensible authority, the learned judge relied on the cases of *Mynn v. Joliffe* (1834), 1 M. & Rob. 326; 174 E.R. 112 (cited in Bowstead on Agency, 12th Edn., at page 56 to support the proposition that an agent employed to find a purchaser and to contract for the sale of an estate has no implied authority to receive the purchase-money); *Drakeford v. Piercey* (1866), 7 B. & S. 515 and *Butwick v. Grant*, [1924] 2 K.B. 483. Mr Wilkinson, for the company, submitted that the statement in Bowstead is not supported by authority. *Mynn's* case is no authority for the proposition: it was decided on an entirely different issue and merely contains a passing observation by Littledale, J., "I think that an agent employed to sell has no authority, as such, to receive payment". No copy of *Drakeford's* case is available to us, but there is a quotation in *Butwick's* case from the judgment of Lush, J., as follows:

> "that an agent authorized to sell has as a necessary legal consequence authority to receive payment is a proposition utterly untenable and contrary to authority".

Mr Wilkinson stressed the words "necessary legal consequence" and argued that the case is no authority for saying that an agent never has such authority. *Butwick's* case itself goes against the statement in bowstead. Horridge, J., after referring to various decisions, concluded:

> "In my opinion there is no hard and fast rule of law that an agent employed to sell has power to receive the price . . ."

and Sankey, J., after referring to the dictum of Lush, J., quoted above, said:

> "In an action by the seller of goods against the buyer for the price it would be open to the buyer who had paid the seller's agent to show, and in the absence of any reason to the contrary he would be entitled to succeed on showing, either that the agent had actual authority to receive, or that he had ostensible authority to receive payment, or that he had a customary authority by reason of the fact that the payment was made to him in the ordinary course of the business of agencies of the kind in question."

Mr Wilkinson submitted that it was not necessary for the purposes of this appeal to show that Ghanshyam had authority to receive the purchase price but only that he had authority to receive a deposit. He argued that Ghanshyam appears to have had an unlimited authority to contract, unfettered even as to price, and that it is usual and proper in a sale of land to require payment of a deposit.

Mr Wilkinson relied strongly, both in this Court and in the court below, on the case of *Ryan v. Pilkington*, [1959] 1 All E.R. 689, a case in which an estate agent was instructed by the owner of property to find a purchaser. It was held that he had ostensible authority to take a deposit because to do so was reasonably incidental to the purpose for which he was appointed, which was the promoting of a sale of the property. The learned judge held that *Ryan's* case was distinguishable, because there the agent was a professional estate agent. Mr Wilkinson argued that this makes no difference: that an estate agent is just as much a special agent as any other person appointed to find a purchaser for property. Moreover, he submitted that the present case is stronger than *Ryan's* case, because here Ghanshyam admittedly had authority to conclude a contract, whereas in *Ryan's* case the agent's authority was limited to reaching agreement "subject to contract".

I think there is considerable merit in this argument, although I would not go so far as to say that an ordinary individual authorized to negotiate has necessarily the same ostensible authority as a professional estate agent. I think that where an individual is concerned, the extent of his ostensible authority will depend to a greater extent on the particular circumstances.

In the present case, it is admitted that the respondent authorized the advocate who held the duplicate certificates of title to the land to hand them over to Ghanshyam. As a result, Ghanshyam was in a position to, and did in fact, hand over the duplicate certificates to the company against payment of the deposit. The learned judge attached no significance to this, because "the mere delivery of a Certificate of Title is wholly ineffectual for the purpose of transfer". That is true, but the possession of a duplicate certificate of title is of considerable importance because an equitable mortgage can be created by its deposit, without any note or memorandum (Registration of Titles Act (Cap. 205), s. 138). I think the handing over of the duplicate certificate of title against payment of a deposit, it might be regarded as given in earnest of the bargain.

I do not think the reported cases are really of any great assistance. I think the matter should be looked at in the light of general principles. The test of ostensible authority, as I understand it, is what an ordinary person dealing with the agent can reasonably assume, in the absence of any notice to the contrary, to be his authority. Such a person, concluding a contract for the purchase of land, would, in my opinion, expect to be required to pay a deposit. In the present case, I think a purchaser dealing with the agent for a named principal, who purported to have an unfettered discretion to conclude a binding contract and who was prepared to hand over the duplicate certificates of title against payment of a deposit, was entitled to assume that the agent had authority to receive the deposit. I would hold, therefore, that the receipt of a deposit was within the ostensible authority of Ghanshyam. It would follow that the respondent is not entitled to recover the amount of the deposit from the company.

I would allow this appeal, set aside the judgment and decree of the High Court so far as they relate to the claim to Shs. 50,000/- and substitute an order dismissing the suit with costs. I would allow the appellant company the costs of this appeal, with a certificate for two counsel.

Law JA: I have had the advantage of reading in draft the judgment prepared by Spry, J.A., and I agree with it entirely. The respondent had gone to India and asked his friend Ghanshyam to "negotiate and effect a bargain" on his behalf for the sale of two properties in Kampala. The respondent instructed his advocates to hand over the duplicate certificates of title to the land to Ghanshyam. Ghanshyam concluded a binding contract for the sale of the land with the appellant, handed over the certificates of title, and demanded

and received from it a sum of Shs. 50,000/- by way of deposit. It seems to me clear that Ghanshyam, having been given full authority to contract, without even a limitation as to price, necessarily had the ostensible authority to receive a deposit on account of the purchase price negotiated by him. The payment of a deposit is a normal incident in transactions for the sale of land. As the learned judge remarked, this is one of those cases where one of two innocent parties must suffer for the dishonesty of a third party. I have no doubt in this case that the loss has to be borne by the seller, that is to say the respondent who gave his agent full discretion and power to conclude a binding contract on his behalf. The demand for and receipt of a deposit was part of the contract, and was within the agent's ostensible authority. I would allow this appeal, and I concur in the order proposed by Spry, J.A.

Duffus JA: I agree with the judgment of Spry, J.A., and as Law, J.A., also agrees this appeal is allowed in accordance with the order set out in the judgment of Spry, J.A.

Appeal allowed. Judgment and decree of High Court set aside so far as it related to the claim for Shs. 50,000/-. *Order dismissing suit with costs substituted. Appellant to have costs of appeal, with certificate for two counsel.*

For the appellant:
PJ Wilkinson, QC and *AV Clerk*
Anil Clerk, Kampala

For the respondent:
Satish Gautama and *VN Ponda*
Ponda, Asaria & Co, Kampala

United Bus Service Ltd v The New India Insurance Co Ltd
[1969] 1 EA 242 (HCT)

Division:	High Court of Tanzania at Mwanza
Date of judgment:	19 September 1968
Case Number:	1/1967 (5/69)
Before:	Seaton J
Sourced by:	LawAfrica

[1] Arbitration – Arbitration clause – Whether estoppel can operate to prevent reliance on.

[2] Contract – Misrepresentation – Proposal for insurance – Motor vehicle – Value of vehicle altered between proposal and acceptance – Law of Contract Ordinance (*Cap.* 433), *s.* 19 (1) (*T.*).

[3] Estoppel – Arbitration clause – Cannot be insisted on where party induced to file suit.

[4] Insurance – Motor vehicle – Insurable interest – Extends to interest of hire-purchase company.

[5] Insurance – Proposal – Misrepresentation – Value of vehicle altered between proposal and acceptance – Materiality – Law of Contract Ordinance (*Cap.* 433), *s.* 19 (1) (*T.*).

Editor's Summary

The plaintiff insured a bus with the defendant. After it was damaged the defendant gave instructions for repair, but subsequently cancelled these and repudiated liability on the grounds of a material misrepresentation of fact in the proposal form. The misrepresentation alleged concerned the value of the bus stated in the proposal to be Shs. 65,000/- but alleged to be over Shs. 100,000/-. In addition the defendant raised the further defences that the plaintiff had failed to submit the dispute to arbitration under the policy and that it was not entitled to recover because of the rights of the hire purchase company in the bus.

Held –

(i) the defendant's attitude had been such that the plaintiff reasonably inferred that a suit might be brought, and therefore the defendant was estopped from relying on the arbitration clause;

(ii) although the bus was insured only in the name of the plaintiff the policy extended to the hire purchase company's interest in it, and the plaintiff could sue in respect of loss or damage although the plaintiff would be a trustee for the hire purchase company of any sum recovered which exceeded the plaintiff's interest;

(iii) the bus was worth Shs. 65,000/- at the time of the proposal, but the plaintiff built a body on to it before the policy was issued increasing its value to Shs. 90,000/- and the answer as to its value was not therefore true, and the defendant was entitled to repudiate liability.

Suit dismissed.

Cases referred to in judgment:

(1) *London and North Western Rail Co. v. Glyn* (1859), 1 E. & E. 652; 120 E.R. 1054.

(2) *Castellain v. Preston* (1883), 11 Q.B.D. 380.

(3) *Reed v. Williamsburg City Fire* (1883), 74 Me. 537.

(4) *Ryan v. Agricultural* (1905), 188 Mass. 11.

(5) *Jureidini v. National British & Irish Millers Insurance Co. Ltd.*, [1915] A.C. 499.

(6) *Maurice v. Goldsbrough*, [1939] 3 All E.R. 63.

(7) *Bowden v. Bank of America National Trust and Savings Association* (1950), 224 P. 2d. 713.

(8) *Pandya v. Oriental Insurance Co.*, [1957] E.A. 21.

(9) *New Zealand Insurance Co. Ltd. v. Andrew Spyron*, [1962] E.A. 74.

(10) *Shah v. South British Insurance Co.*, [1962] E.A. 131.

Judgment

Seaton J: The plaintiffs are a limited liability company operating a fleet of 18 buses in and between Ukerewe Island, Mwanza, Mara Region and Arusha. Their business office is in the town of Musoma. In

June, 1965 they purchased a new Albion bus Registered Number MZB 144 which was partly financed by a hire purchase loan from the Credit Finance Corporation Limited of Nairobi. As had been their custom since 1952, they arranged to insure the new bus with the defendants through their Musoma agents. A proposal form was completed on May 18, 1965, which was sent by Mr K. K. Vasant, one of the defendants' Musoma agents, to the Dar-es-Salaam office of the defendants' principal representatives in Tanzania. A policy of insurance was issued to the plaintiffs by the defendants dated July 26, 1965 indemnifying the plaintiffs against loss of or damage to the bus MZB 144 up to Shs. 65,000/-. On February 7, 1966 the bus overturned on the Musoma/Tarime road in the Mara Region and the plaintiffs informed the defendants. The latter at first gave instructions to have the bus repaired but subsequently

cancelled those instructions and repudiated liability on the ground that there had been a material misrepresentation of fact by the plaintiffs in the proposal form.

This suit was commenced by the plaintiffs after repeated requests to the defendants to repair the bus had been unsuccessful. The bus was eventually repaired on the plaintiffs' own instructions. The plaintiffs claimed Shs. 27,000/- being the cost of those repairs plus Shs. 35,800/- damages for breach of contract, being the estimated loss of profits from non-use of the bus during the period its repair had been delayed. The defendants denied liability on the ground of material misrepresentation of fact as well as upon the plaintiffs' warranty of truth of the statements and particulars in the proposal form. The particular misrepresentation and false statements complained of were contained in replies to questions 1, 7 (*a*) and 7 (*b*) in the proposal form. It was alleged that by those replies the plaintiffs stated the value of the bus to be insured and its accessories as Shs. 65,000/-, whereas the value was over Shs. 100,000/-. An additional ground of defence was the plaintiffs' failure to submit this matter to arbitration as required by the insurance contract. It was also denied that the plaintiffs are entitled to sue under the contract because of Endorsement No. 15 of the insurance policy relating to the hire purchase agreement or that the defendants have any right to any monies payable under the contract. In reply, the plaintiffs contended that the defendants' repudiation of the contract has in effect estopped them from relying on the arbitration clause therein.

It may be convenient to set out here the most relevant questions and answers of the proposal form and clauses of the insurance contract. They are as follows:

THE PROPOSAL FORM

"Question

No. 1 Particulars of Vehicles to be insured

Registered Number and Letters	Description and Maker's Name	Type of Body	Engine c.c.	Year of Make	Carrying capacity		Proposer's estimate of (1) present value and (2) accessories
					Persons	Goods	
New MZB 144	Albion CD 23 ALW Clydesdale Engine No. 400/1Y3 A/ 100	Bus	6540	1965	59 passen-ge	Passenge luggage	(1) Shs. 65,000/-
							Shs. 65,000/-

Question

No. 7 (*a*)	Is the vehicle your sole and absolute property?	No, under H.P. Agreement with C.F.C.

(*b*)	Date of purchase by you, the price paid and whether new or second-hand?	June, 1965, New Shs. 65,000/-.

THE INSURANCE POLICY

Preambular Clause

"Whereas the Insured by a proposal and declaration which shall be the basis of this contract and is deemed to be incorporated herein has applied to the Company for the insurance hereinafter contained and has paid or agreed to pay the Premium as consideration for such insurance.

Now this Policy Witnesseth:

That in respect of events occurring during the Period of Insurance and

subject to the terms exceptions and conditions contained herein or endorsed hereon (hereinafter collectively referred to as the Terms of this Policy):

Loss or Damage

1. The company will indemnify the Insured against loss or damage to the Motor Vehicle and its accessories and spare parts whilst thereon

 (*a*) by accidental collision or overturning or collision or overturning consequent upon mechanical breakdown or consequent upon wear and tear;

 (*b*) by fire external explosion self-ignition or lightning or burglary housebreaking or theft;

 (*c*) by malicious act;

 (*d*) whilst in transit (including the processes of loading and unloading incidental to such transit), by road rail inland waterway lift or elevator.

2. At its own option the company may pay in cash the amount of the loss or damage or may repair reinstate or replace the Motor Vehicle or any part thereof or its accessories or spare parts. The liability of the Company shall not exceed the value of the parts lost or damaged and the reasonable cost of fitting such parts. The Insured's estimate of value stated in the Schedule shall be the maximum amount payable by the Company in respect of any claim for loss or damage.

Conditions

9. All differences arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meetings and making of an Award shall be a condition precedent to any right of action against the Company. If the Company shall disclaim liability to the Insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.

10. The due observance and fulfilment of the Terms of this Policy insofar as they relate to anything to be done or not to be done by the Insured and the truth of the statements and answers in the proposal shall be conditions precedent to any liability of the Company to make any payment under this Policy.

Endorsements

Endorsement No. 1

ATTACHED to and forming part of Policy No. KJ/MVC/6440

Excess all Claims.

It is hereby understood and agreed that notwithstanding anything to the contrary contained in Sections I, II and III of this Policy the Insured in respect of each and every event shall be responsible for the first Shs. 2,000/- (or any less expenditure which may be incurred) of any expenditure for which provision is made thereunder (including any payments in respect of

cost and expenses) and of any expenditure by the Company in the exercise of its discretion under Condition 5 of this Policy.

If the expenditure incurred by the Company shall include the amount for which the Insured is responsible hereunder such amount shall be repaid by Insured to the Company forthwith.

For the purpose of this endorsement of express 'event' shall mean an event or series of events arising out of one cause in connection with any one motor vehicle in respect of or in connection with which indemnity is granted under this Policy.

Endorsement No. 15

Hire Purchase Agreement

It is hereby understood and agreed that Credit Finance Corporation Ltd. (hereinafter referred to as the owners) are the owners of the Motor Vehicle and that the Motor Vehicle is the subject of a Hire Purchase Agreement made between the Owner of the one part and the Insured of the other part and it is further understood and agreed that the Owners are interested in any monies which but for this Endorsement would be payable to the Insured under this Policy in respect of loss of or damage to the Motor Vehicle (which loss or damage is not made good by repair reinstatement or replacement) and such monies shall be paid to the Owners as long as they are the Owners of the Motor Vehicle and their receipt shall be a full and final discharge to the Company in respect of such loss or damage.

Save as by this Endorsement expressly agreed nothing herein shall modify or affect the rights and liabilities of the Insured or the Company respectively under or in connection with this Policy."

The premium paid was Shs. 3,600/- and the period of insurance was from June 28, 1965 to June 27, 1966.

The issues as agreed were as follows:

1. Has the plaintiff company cause of action under exhibit "A" of the plaint under endorsement No. 15 hire purchase agreement and/or entitled to sue the defendant company thereon?
2. Is the plaintiff company's suit against the defendant company premature in pursuance of condition 9 arbitration clause of exhibit "A" of the plaint as per pleadings?
3. Was exhibit "A" issued by the defendant company on the basis of the proposal form and upon reliance thereon and the truth of the statements contained therein? If so, were the representations of fact contained in answers to question 1 and question 7(*b*) of the proposal form true?
4. If not, is the defendant company entitled to repudiate its liability thereunder according to pleadings?
5. If not, has the plaintiff company suffered damage to vehicle MZB 144 in the sum of Shs. 27,000/- as alleged and if not what is the value of damage?
6. Is the plaintiff company entitled to claim loss of profits? If so, at Shs. 100/- per day as alleged?
7. To what reliefs either party is entitled?

The Court has had the benefit of lucid and able presentation by learned counsel and after hearing the testimony and reading the documents submitted on behalf of both parties, has come to the following conclusions:

As to the first issue: the Hire Purchase Agreement between the plaintiffs

and C.F.C. was made on June 11, 1965. It described the plaintiffs as the hirers and C.F.C. as the owners of the bus MZB 144 and provided for the hire rental with option of purchase by the plaintiffs of the bus MZB 144, the total purchase price of which was described as Shs. 65,275/-. The sum of Shs. 26,100/- paid by the plaintiffs on the signing of the agreement was to be credited to the hirer only in the event of such option to purchase being exercised by him. The plaintiffs agreed to pay eleven consecutive monthly hire rentals of Shs. 3,591/- per month and a final twelfth hire rental of Shs. 3,611/-. These payments were to commence on June 28, 1965.

By clauses 2 (*d*) and (*c*) of the Agreement the plaintiffs agreed to keep and maintain the bus and all parts thereof in good order, repair and condition and to carry out all repairs and replacement at their own cost. By clauses 2 (*f*) and (*g*), the plaintiffs agreed to be responsible for the loss or destruction of or damage to the bus and to repay C.F.C. on demand any costs, charges or expenses paid by them for or arising out of or in connection with the repair of the bus. By clause 2 (*h*) the plaintiffs agreed to insure the bus with an insurance company approved by the owners under a comprehensive policy of insurance against all risks and irrevocably appointed C.F.C. as their sole agents and the only persons to receive all monies payable under any such insurance and to negotiate, agree or compromise with the insurance company as to the amount so payable and to institute proceedings whether in the name of the plaintiffs or otherwise for the recovery of such monies and to give an effectual receipt and discharge to the Insurers.

The bus MZB 144 was duly insured with the defendants in a comprehensive commercial vehicle policy for the period June 28, 1965 to June 27, 1966. Exhibit “A” contained *inter alia* endorsement No. 15 which has been set out above. The certificate of registration indicates that the bus MZB 144 was registered in the joint names of the plaintiffs and C.F.C. on July 3, 1965, and it was released to the plaintiffs on July 19, 1966. The present suit was filed on February 14, 1967.

The advocate for the defendants has submitted that if any one is entitled to bring the present suit, it is C.F.C. and not the plaintiffs. He has urged that in order to determine the right to sue, only the plaint should be looked at, including exhibit “A” with its conditions and endorsements. Endorsement 15 specifically states that the ownership of the vehicle is vested in C.F.C. so long as there is money due. Paragraph 12 of the written statement of defence pointed out that according to this endorsement, the plaintiff had no cause of action under the policy and the plaint should be dismissed. As the plaintiffs did not, in their reply, state the fact that the bus MZB 144 is no longer subject to the hire purchase agreement but merely joined issue on this point, the plaintiffs could not lead evidence to fill the gap in the pleadings in order to establish a cause of action. In support of his contention, the advocate for the defendants relied on Goode’s Hire Purchase Law and Practice (1962), pages 330 – 332 and Shawcross’ Motor Insurance, 2nd Edn., pages 633 – 634.

The advocate for the plaintiffs submits that no cause of action arose under the policy until the defendants refused to have the bus repaired or to pay for the repairs. The effect of endorsement 15 was not to take away the plaintiffs’ right to sue under the policy but to provide a full discharge to the defendants had they exercised their option to pay cash to C.F.C. for repairs to the bus that had been carried out. Alternatively, he submitted that the plaintiffs as the insured being in possession of the bus had a right to sue. In support of his contention, he cited *Pandya v. Oriental Insurance Co*., [1957] E.A. 21 and McGillivray on Insurance Law at paragraph 454.

It seems to be the view, according to Goode, op. cit., at pages 330 and 332, that the sum recoverable by the hirer under a policy in the event of loss of or

damage to the goods depends upon whether he is insured for his own interest alone or whether the policy in his name extends also to the owner's interest in the goods. In the latter event the hirer can sue the insurers but he is a trustee for the owner for such part of the sum recovered as exceeds his interest. Where an endorsement is assented to by the hirer as in the present case, it may constitute evidence of the hirer's intention to insure for the owner's interest as well as for his own so as to entitle the owner to make a claim in his own name direct against the insurers.

The cases of *Castellain v. Preston* (1883), 11 Q.B.D. 380; *Maurice v. Goldsbrough*, [1939] 3 All E.R. 63; and *London and North Western Rail Co. v. Glyn* (1859), 1 E. & E. 652 are cited by Goode as supporting the above propositions. The last-mentioned case was not available but this Court has derived some benefit from perusing the first two of the above-mentioned cases. In *Castellain v. Preston*, a judgment of the English Court of Appeal which dealt with fire insurance, where a vendor received the purchase price of a house that had burnt down, it was held, in an action by the insurer against the vendor, that the insurer was entitled to recover from the vendor for their own benefit a sum equal to the insurance money which had been paid to the vendor. In his judgment, with which Cotton and Bower, LL.J., concurred, Brett, L.J., stated as follows:

> "In order to give my judgment upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the Courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong."

In *Maurice v. Goldsbrough* the issue was whether the insurance, being in the usual form of cover for bailees and warehousemen, covered the profits on the wool or only the value of the wool. It was held that the profits could not be covered unless expressly referred to. Lord Wright, delivering the judgment of the Privy Council, distinguished between the subject matter which was insured under the policy and the assured's interest in the subject matter and commented as follows:

> "The subject matter, for the purposes of the present policy, is the merchandise – that is the wool – which is insured against the risk of physical loss or damage by fire. While, however, the subject matter of the insurance is the chattel, the basis of the insurance is that the assured stands in such relation to the chattel that he may be prejudiced by its loss or damage, in accordance with the various principles which have been settled for regulating what constitutes insurable interest."

Shawcross lays down, at pages 633–634, in terms similar to Goode, the general principles applicable but insists on the importance of having regard to the facts and the wording of the endorsement in each particular case.

Pandya v. Oriental Insurance Co., [1957] E.A. 21 is of some general interest in this case since it also involved an insurance company and a hire purchase agreement. In that case, however, the contest was between the owners under

the hire purchase agreement and the insured and it was held that the owners had an independent right of action if monies became payable under the policy. In the case cited, the policy had not yet been issued but the cover-note stated that both the hirer and the owners were insured.

According to McGillivray, paragraph 454, where by the terms of a hire purchase agreement, the whole risk is on the hirer, he can recover to the full value of the property, notwithstanding that the property remains with the owner. Three American cases – *Ryan v. Agricultural* (1905), 188 Mass. 11, *Reed v. Williamsburg City Fire* (1883), 74 Me. 537, and *Bowden v. Bank of America National Trust and Savings Ass*. (1950), 224 P. 2d 713 – are cited as supporting this proposition. This Court has not had the opportunity of perusing the three last mentioned cases. However, the proposition deduced by McGillivray therefrom would seem to be consistent with *Castellain v. Preston* and *Maurice v. Goldsbrough* from which extracts have been quoted above.

I am of the view that although the plaintiffs in the present case were insured in their name alone, the policy extended also by virtue of endorsement 15 to C.F.C's interest in the bus MZB 144. However, since under clause 2 (*f*) of the hire purchase agreement the whole risk of the bus was upon the plaintiffs, notwithstanding that the property remained with C.F.C., the plaintiffs can sue the defendants for breach of their contract to indemnify them against loss of or damage to the bus. In the event of success in such claim against the defendants, the plaintiffs would be a trustee for C.F.C. for such part of the sum recovered as exceeds their interest. The first issue is accordingly decided in favour of the plaintiffs.

As to the second issue: under condition 9 of the policy all differences "arising out of" the policy were to be referred to the decision of an arbitrator; if the defendants should disclaim liability to the plaintiffs for any claim under the policy and such claim had not been referred to arbitration, it should be deemed to have been abandoned and should thereafter be irrecoverable. The defendants' advocate drew a distinction between repudiation of the whole of the policy and repudiation of liability to pay the amount claimed under the terms of the policy. In the present case, he contended, the defendants' repudiation fell within the latter category; the arbitration clause is a condition precedent to the institution of legal proceedings and, as it had not been complied with, the suit is premature. He referred to numerous authorities in support of these contentions.

For the plaintiffs, the advocate submitted that the denial of liability by the defendants was on grounds which went to the root of the contract, hence they were not entitled to seek relief under one of its subsidiary clauses which provided for arbitration. In any event, the obligation to submit to arbitration rested equally upon the defendants, he contended, yet never had they invoked the arbitration clause until after the suit had been filed; this amounted to a waiver of the arbitration clause and the defendants were estopped from seeking relief thereunder.

The correspondence between the parties on the question of arbitration was not extensive. On October 11, 1965 the plaintiffs' advocate wrote to the defendants' advocate observing that his clients' claim to be indemnified under the terms of the policy appeared to have been repudiated and he requested to know precisely under what conditions or provisions of the policy the defendants relied in repudiating the claim. On October 22, the defendants' advocates replied that:

> "The claim has been repudiated (*inter alia*) on the grounds of non-disclosure and/or misrepresentation, and all the terms concerning such

> non-disclosure or misrepresentations, contained in the proposal form, and/or the policy and/or the claim form in that behalf."

By letter dated October 28 the plaintiffs' advocate replied that it seemed the defendants repudiated the policy as a whole; accordingly the arbitration clause was equally repudiated and he proposed to advise his clients to institute proceedings in the courts unless the defendants informed him within ten days that they were prepared to fully indemnify the plaintiffs. The defendants never replied directly on the question of arbitration but confirmed on November 22 that the defendants "repudiated their liability in terms of the policy".

I have referred to the authorities cited, including *Jureidini v. National British and Irish Millers Insurance Co. Ltd.*, [1915] A.C. 500; *Shah v. South British Insurance Co*., [1962] E.A. 131; *New Zealand Insurance Co. Ltd. v. Andrew Spyron*, [1962] E.A. 74; and the standard text writers on this subject. It appears to me that the repudiation by the defendants was on the ground that apparent consensus ad idem was vitiated by misrepresentation or non-disclosure; that the consequent refusal of the defendants to honour their obligation to indemnify the plaintiffs for loss of or damage to the bus MZB 144 was a difference "arising out of" the policy, the submission of which to arbitration was a condition precedent to a right of action against the defendants; that the defendants had by their conduct in correspondence through their advocate taken an attitude which the plaintiffs might reasonably infer to be a representation that for the purpose of determining liability a suit might be brought without first going to arbitration; that the plaintiffs had acted on such a representation to their prejudice if arbitration as a condition precedent is insisted upon; and as a result waiver by estoppel would arise. Accordingly, on the second issue, I find in favour of the plaintiffs.

As to the third issue: the proposal for the contract of insurance was made by the manager/accountant of the plaintiffs' company. His duties were to purchase vehicles and motor spares, to negotiate documents, to settle claims, to settle disputes, to maintain relations in case of accidents, to go on site and to act accordingly as necessary and to maintain books of account and relevant documents. This witness, who gave his testimony with commendable candour, testified that since 1952 the plaintiffs had taken out not less than 400 insurance policies with the defendants through their Musoma agents. During 1966, the plaintiffs' whole fleet of 18 buses were insured with the defendants; this figure did not include cars and landrovers which the plaintiffs also operated. In 1965 the bus MZB 144 was purchased in Nairobi from Leyland Albion (E.A.) Limited. After the vehicle came to Musoma, the witness gave the chassis number and other registration particulars to Mr K. K. Vasant, the defendants' agent in Musoma, so that he might issue a comprehensive policy. These particulars were filled in on the proposal form by Mr Vasant and it was signed by the witness. The witness could not recall whether he had instructed Mr Vasant regarding these particulars by telephone or by leaving with him the hire purchase agreement.

Question No. 1 in the proposal form referred to the proposer's estimate of (*i*) present value of and (ii) accessories on the vehicle to be insured. The answer given to this question in the last column of the proposal form was: "Shs. 65,000/-". Question No. 7 (*a*) in the proposal form inquired whether the vehicle was the sole and absolute property of the proposer, to which the answer was given: "No, H.P. Agreement with C.F.C." Question 7 (*b*) in the proposal form inquired as to the date of purchase of the vehicle, the price paid and whether it was new or second-hand. To this question, the answer was "June, 1965, new, Shs. 65,000/-". The proposal form was signed on May 18, 1965. A cover-note was signed by Mr K. K. Vasant in respect of the vehicle

identified by engine and chassis number, at the declared value of £3,250 with an excess of £100. The period covered by the interim cover-note was June 28, 1965 to July 27, 1965.

On July 2, 1965 another cover-note was issued referring to the previous cover-note and the engine and chassis number of the vehicle which in effect extended the period of coverage from July 2, 1965 to August 2, 1965. The witness went to Nairobi with the first cover-note, apparently to complete the purchase of the bus and financing arrangements with C.F.C. The second cover-note was required to effect the registration of the vehicle of which, by July 2, 1965, delivery had been taken by the plaintiffs. After registering the vehicle, Mr K. K. Vasant was informed that its number was MZB 144 and this number was subsequently inserted in the proposal form in a different ink and handwriting than the other particulars therein.

The witness testified that Shs. 65,275/- was the purchase price of the bus from Leyland Albion (E.A.) Limited. On July 26, 1965 the defendants issued a certificate of insurance in respect of the insurance of bus MZB 144, the period of which commenced on June 28, 1965 and expired on June 27, 1966. Subsequently the policy itself was received by the plaintiffs. The policy indicated that the amount for which the bus was insured was Shs. 65,000/- and that this was also the insured's estimate of its value including accessories and spare parts. However, Shs. 65,000/- represented the price of the chassis and cab of the vehicle as purchased from Leyland Albion (E.A.) Limited less a discount of 5 to 7½ per cent. After purchase, the plaintiffs had a bus fitted on to the chassis at a cost of about Shs. 25,000/-. The total cost of the bus MZB 144 was therefore in the region of Shs. 96,000/- and the witness agreed that this latter figure, rather than Shs. 65,000/-, was the true market price.

The witness testified that the body of the bus MZB 144 was built on during the month of June, before the insurance policy had been issued. He did not inform Mr K. K. Vasant of the addition to or increase in value of the bus and the defendants made no inquiry regarding this particular matter. According to the witness, Mr K. K. Vasant had been the plaintiffs' insurance agent on behalf of the defendants since 1952; all of the plaintiffs' insurance policies for their fleet of buses and other vehicles were taken out through him and their usual procedure was to give him the chassis and engine number and a copy of the hire purchase agreement, if any, from which the other particulars in the proposal form would be filled in. In regard to question 7 (*b*) in the proposal form, the witness provided the information to Mr Vasant that the cost of the vehicle to be insured was Shs. 65,000/- and he intended to insure the whole bus and not just the chassis and the engine. The witness knew that for a comprehensive insurance such as he desired, the rate of insurance premium would depend on the value of the vehicle.

Ajit Singh Choda, a partner in the firm of Choda Brothers, bus body builders of Nairobi, testified that for the body built on to the chassis of bus MZB 144, his firm charged the plaintiffs Shs. 25,000/-. Chandi Ram Isherdas, the managing director of the plaintiffs, testified that the purchase price paid for the bus MZB 144 was Shs. 65,275/- and the price paid for the body subsequently constructed was Shs. 24,000/-. The total price of the bus was, therefore, Shs. 89,275/-. It appears that on February 16, 1966, after the accident in which the bus was injured, a claim form was submitted to the defendants. In this claim form, which was made out by the manager/account and signed by the managing director, the question 4 (*d*) "Price paid by the insured" was answered "Shs. 65,000/-".

Babubhai Champaklal Tolat was the defendants' resident representative in Tanzania from May 5, 1965 to July 31, 1967. It was he who initialled the

cover-note after receiving the proposal form in the defendants' representatives' office in Dar-es-Salaam on May 25, 1965. On July 8, 1965 the Dar-es-Salaam office received the second cover-note and on July 14, 1965 a letter from Mr Vasant stating the registration number of the vehicle to be MZB 144, and requesting the policy to be issued "at your earliest". In pursuance thereof, the insurance policy was issued. The premium charged, Shs. 3,600/-, was computed on the basis of a bus with carrying capacity for 59 passengers valued at Shs. 65,000/-, i.e. at a rate of Shs. 2,080/- for a bus with carrying capacity of 26 passengers valued at Shs. 8,000/-, Shs. 1,425/- for the difference between the declared value and Shs. 8,000/-, that is Shs. 57,000/-; Shs. 495/- for the difference in number of passengers between 59 and 26, that is 33; plus 10 per cent F.D. at Shs. 400/-. After issuing the insurance policy on July 6, 1965 the defendants certified to C.F.C. that the value of the vehicle insured was Shs. 65,000/-.

According to Tolat the defendants had no knowledge that the cost of an Albion bus was Shs. 90,000/- or that the market price of this particular bus was more than Shs. 65,000/- until after the accident. He could not agree that Shs. 65,000/- was correct even as an estimate of the value of a bus worth in the region of Shs. 96,000/-. The defendants' maximum limit for the value of a vehicle insured was Shs. 75,000/-. If the value of the vehicle proposed to be insured was in excess of this value, the defendants would prefer not to underinsure it to the extent of Shs. 75,000/-, because not only would they be deprived of the additional premium but they would be incurring more liability. He admitted that during 1965 the defendants had insured another vehicle of the plaintiffs to the value of Shs. 90,000/-. He explained that the insurance policy dated March 6, 1965 in respect of the bus MZA 697 had been insured during a period when, unfortunately, the defendants had no resident representative in Tanzania. Tolat's predecessor had left in November, 1964, and he himself only arrived in May, 1965. Hence the policy had been issued by the insurance clerk of the department. The premium charged for it had been Shs. 3,955/-, its carrying capacity being 60 passengers. It was not the procedure of the defendants to inspect a vehicle before issuing an insurance cover-note, reliance being placed on the correctness of the information contained in the proposal form.

The advocate for the defendants has pointed out that from the recital in the policy the proposal and declaration formed the basis of the insurance contract and were incorporated in the policy; and from condition 9 of the policy, the truth of the statements and answers in the proposal is made a condition precedent to any liability of the defendants to make any payments under the policy. He argued that it is abundantly clear from the evidence that the correct value of the bus MZB 144 was Shs. 90,000/- or more and not Shs. 65,000/- as stated in the proposal form. The agent, Mr K. K. Vasant, was, he submitted, for the purposes of filling in or assisting in the proposal form or deriving knowledge, an agent of the proposer not of the insurance company. He referred to Shawcross, op cit., McGillivray, op cit., General Principles of Insurance Law by E. R. Hardy Ivamy and decided cases.

The advocate for the plaintiffs submitted that on May 18, 1965 what the plaintiffs insured was a vehicle whose value was Shs. 65,000/-. This was a true statement of fact when made in answer to the questions in the proposal form. Had further queries been made, the plaintiffs would give full information. As none were made, and the defendants issued the policy on the basis of the proposal form, they were estopped from saying that they understood Shs. 65,000/- to be the value of the vehicle together with the body. The policy contained no clause that it should be a condition precedent that the vehicle should be insured to its full value. This is, he contended, a case of under-insurance, not of mis-statement

or misrepresentation of fact. The advocate also suggested that there was a possibility that the second cover-note was issued by mistake, that the registration number MZB 144 was inserted in the proposal form by mistake and two insurance policies were issued on the same day, and another policy, in which values and premiums were juxtaposed. He referred to Halsbury's Law of England and other authorities.

On the evidence, I find that the policy was issued by the defendants on the basis of the proposal form and upon reliance thereon and the truth of the statements contained therein. As to questions 1 and 7 (*b*), the representations of facts were literally true in the sense that at the time made, i.e. May 18, 1965, the "present value" of the vehicle was Shs. 65,000/- since it consisted only of chassis and engine and the purchase price of same was only Shs. 275/- more than that stated. The representations of fact were also true in the sense that they represented the value of the amount for which the plaintiffs proposed to insure the vehicle. But the answers to questions 1 and 7 (*b*) were not true representations of the actual value or market price of the bus MZB 144 by the time the insurance policy was issued in respect thereof.

As to the fourth issue: the insurance contract between the plaintiffs and the defendants is governed by the Law of Contract Ordinance, Cap. 433. [The learned judge set out ss. 10, 14, 18, 19, 20 and 22 of the Ordinance and continued:]

Our Law of Contract Ordinance is based on the Indian Contract Act 1872, which itself was a replica of the English Law of Contract up to that time, some-what simplified and altered in minor particulars. Commenting on the English Law, Shawcross suggests (at pp. 419–420, op cit.) that the result in practice of including in the insurance policy terms such as the recital clause and condition 10 of exhibit "A" is to make the statements in the proposal form become terms of the contract itself; the far-reaching effects of this "elevation of representations into warranties" are to make the degree of mis-statement immaterial; the question of the materiality of the mis-statement or the non-disclosure in questions is irrelevant; and the insurers are entitled to repudiate liability on the ground of breach of the terms of the insurance contract itself and are not obliged to go outside the contract to the Common Law of mis-representation or non-disclosure which must operate as inducement or as to the materiality respectively.

Hardy Ivamy states (at pp. 108–109, op. cit.) that if a statement of fact made by the assured, in the discharge of his duty of disclosure, is accurate, when applied to the circumstances to which it was intended to apply, the assured has discharged his duty, notwithstanding that it may be shown to be inaccurate when considered with other circumstances to which it was never intended by either party to apply; and (at p. 122) the fact that the answer is literally true does not protect the assured where the statement is nevertheless false when taken in relation to other relevant facts which are not stated.

McGillivray points out (at p. 876, op. cit.) that the assured's duty is absolute to disclose everything within the knowledge of himself or his agent which would affect the judgment of a rational insurer governing himself by the principles and calculations on which insurers do in practice act, and which might thereby induce such an insurer either to refuse the insurance altogether or to add an extra to the premium; and (at p. 919) the material date up to which full disclosure must be made is the moment when a binding contract is concluded.

In the present case, it would appear from the evidence that the insurance contract commenced on June 28, 1965. Before this date, the value of the vehicle to be insured rose from Shs. 65,000/- to at least Shs. 89,000/-. It is said by the defendants that knowledge of this extra valuation would have affected their

judgment as to whether to refuse the insurance; it would certainly have added an extra amount to the premium. Most of the reported cases involve overvaluation and it is well known that insurers frequently refuse a risk on the ground that it is speculative. In the present case, it is not suggested that the under-valuation was fraudulent. Its explanation may be that the plaintiffs are concerned only to discharge their obligation to C.F.C. to insure the vehicle under a comprehensive policy. There was testimony that in purchasing new vehicles, it was necessary to obtain comprehensive insurance for the first twelve months because of the finance company's requirements. On the other hand, if a vehicle was purchased by trading in an old one, the plaintiffs would only take out a third party insurance. After the hire purchase agreement had been paid off, the plaintiffs would convert the insurance policy to a third party type.

It seems to me that the positive assertions by the plaintiffs in answer to questions I and 7 (*b*) of the proposal form, though literally true, were false when taken in relation to the fact that a body was to be built on to the bus costing Shs. 24,000/-; that the plaintiffs were under a duty by virtue of the recital clause and condition 9 of the policy to disclose to the defendants the true value or actual market price of the vehicle to be insured at the material date, i.e. June 28, 1965, when the binding contract was concluded; that the plaintiffs thereby misled the defendants into consenting to issuing the policy which they would otherwise have declined to do; and this was to the advantage of the plaintiffs since the consequences were that the cover-notes were issued, the hire purchase agreement was concluded, the sale completed and registration effected on the strength of the defendants consenting to issue the insurance policy, 1, therefore, find in accordance with s. 19 (1) of the Law of Contract Ordinance that the contract of insurance was voidable at the option of the defendants,

[The learned judge then went on to deal with other issues.]

Suit dismissed

For the plaintiff:
DN Parekh
DN Parekh, Mwanza

For the defendant:
NP Dhanani
VP Dhanani, Mwanza

Salum v Asumini
[1969] 1 EA 255 (HCT)

Division:	High Court of Tanzania at Mwanza
Date of judgment:	11 June 1968
Case Number:	82/1968 (6/69)
Before:	Seaton J
Sourced by:	LawAfrica

[1] Matrimonial Causes – Custody – Mohammedan law – Child of one year – Mother living in adultery – What is in the best interests of the child.

[2] Mohammedan law – Custody – Of child of one year – Mother living in adultery – Husband making no claim for custody – Khula divorce – Grant of custody to parernal grandfather.

[3] Mohammedan law – Divorce – "Khula" – Father as agent for his son – Consideration not fully paid – Validity of divorce not affected by non-payment.

Editor's Summary

The respondent, Asumini, had married Husein, the son of the appellant, for an agreed dowry of two cows and Shs. 200/-, one cow of which remained unpaid at the date of the suit. After several years of marriage, Asumini returned one cow to the appellant and left Husein, taking with her one child of the marriage, aged one year at the date of the suit. Asumini's father gave evidence to the effect that Asumini had married Husein twelve years ago according to Muslim custom, and that she had not been divorced although she had run away and been found guilty of committing adultery. The appellant had asked the respondent's father to return the dowry but only one cow had been returned. In the court below, the magistrate dissolved the marriage and ordered that the dowry should be returned and that the child should be in the custody of his mother Asumini for seven years. The magistrate further ordered that the child should remain with Asumini in her home and that if she removed the child elsewhere, the child's father would be entitled to claim custody of the child. Three months later, the appellant complained to the court that the respondent had taken the child to live with another man and the magistrate ordered that the child should remain with Asumini, on her promising to obey the court's conditions. Three weeks later, the appellant again complained that Asumini had plans to send the child to the home of the other man and the court issued an order that the child should be placed in the custody of the appellant. On appeal to the District Court, the custody of the child was given to the maternal side and the court found that there had been a "Khula" divorce between Asumini and her husband. The appellant then brought this further appeal to the High Court.

Held –

(i) a "Khula" divorce is obtainable at the initiative of the wife;

(ii) the appellant had at all times acted as agent for his son on the divorce;

(iii) although consideration for the "Khula" divorce had not been paid in full, there was a valid divorce; and the amount of "Ewaz" unpaid should be recovered from either the respondent or her father;

(iv) the welfare of the child in custody cases is the paramount consideration and because the appellant, the child's paternal grandfather, had at all times manifested his interest in the child, the custody should be restored to the appellant.

Appeal allowed. Order of primary court as to custody restored. No order as to costs.

Cases referred to in judgment:

(1) *Lalli v. Asha* (1914), 5 E.A.L.R. 165.

(2) *Suddan v. Faiz Baksh* (1920), 1 Lah. 402.

(3) *Bazul ul Raheem v. Luteefut oon Onnissa* (1861), 8 Moo.I.A. 378.

Judgment

Seaton J: These proceedings commenced in the primary court of Kalinzi as Civil Case No. 60 of 1967. The plaintiff Asumini Ngobesi (the present respondent) sued the defendant El Haji Salum Mborogomwe (the present appellant) for preventing the plaintiff from getting married to another husband. It seemed that Asumini had originally been married to the son of El Haji Salum but she no longer wished to remain his wife. Asumini contended that El Haji Salum would not consent to her divorcing his son nor would he agree to her being married to another man.

Evidence was taken of Asumini and of El Haji Salum after which by consent the matter was referred to Sheikh Musa Rahan who is a magistrate of the Ujiji primary court at Kigoma and the case was transferred there. On November 20, 1967 the case was heard de novo before the Sheikh who sat with two assessors, a man and a woman, Saudi Ramdhani and Tatu Chamba respectively. Before the Sheikh, evidence was given to the effect that Asumini had married El Haji Salum's son Husein for the agreed dower of two cows and Shs. 200/- but there remained one cow, which was still unpaid at the time of the suit. After several years of marriage Asumini returned to El Haji Salum one cow and left Husein, although the parties had not been divorced, taking with her a child aged one year at the time of the suit, named Abasi. In her evidence Asumini admitted that during the period that she had lived with Husein as her husband she had given birth to eight children, four of whom died and four of whom were still living. Nevertheless, she contended that Husein was impotent and that the children had been born through her having had sexual relations with Husein's brother, which was a secret of the family.

Husein did not give evidence but Asumini's father, Robesi, did. His evidence confirmed that his daughter had married Husein some twelve years ago according to Muslim customs and that she had not been divorced, although Asumini had run away and had been found guilty of committing adultery for which she was imprisoned. It appeared from the evidence of Asumini's father, Robesi, that El Haji Salum had requested him to return the dower because of Asumini's delinquencies but Robesi had only been able to return one cow, leaving Shs. 200/- unpaid. Robesi wished his daughter to remain with Husein peacefully.

One of the four children of Asumini who is still alive was given in marriage by Husein and has herself given birth to a child. Robesi testified that Asumini had never told him anything about her alleged difficulties with her husband and hence he suggested that they were untrue. The assessors were divided in their opinions, the gentleman assessor being of the view that Asumini's claims were false and that Asumini should return to her husband Husein, the lady assessor believing Asumini that her husband was impotent and therefore the dower should be returned and the marriage dissolved. However, the learned magistrate preferred the view of the first assessor and agreed with him that Asumini was still the wife of Husein and Abasi was his child.

The marriage was dissolved by the court and the magistrate made an order that the dower should be returned and that the child Abasi should be within the custody of his mother for seven years, adding that

> "she is not allowed to live with that child anywhere but at her home. But if she disobeys and lives with the

child anywhere else, where the child's owner does not want, the child's father can break this mother's care".

Subsequently, on December 12, 1967 El Haji Salum complained to the magistrate

that Asumini had broken her promise by going to Nkalinzi to live with another man and taking the child with her whereupon the magistrate ordered Asumini to be arrested and prosecuted under s. 114 (HH) of the Penal Code, Cap. 16. Again, the magistrate ordered that the child Abasi should remain in Asumini's custody upon the mother's promise to him that she would obey the court's conditions. However, on January 3, 1968 El Haji Salum complained again that Asumini had plans to send Abasi to Nkalinzi, whereupon the court issued an order that the child should be placed in the custody of El Haji Salum; and that if Asumini refused to stay with the child, the child should be placed in the custody of its father Husein.

On appeal the learned District Magistrate held that there had been a "Khula" divorce between Asumini and Husein; that since one cow had been returned for the purpose of "Khula", Asumini should not be made to return to Husein unless there was a re-marriage; and that on the evidence Abasi was not Husein's child but was born out of wedlock. The learned magistrate ordered that Asumini's father, Robesi, should complete the return of the dower for the "Khula"; that should he fail to do so, El Haji Salum would have a right to sue him for the recovery and he gave custody of Abasi to the "maternal side".

It would seem that there are four major questions to be decided in this appeal: the first, as to the dissolution of the marriage or divorce; the second, as to the dower; the third as to the paternity of Abasi; and the fourth, as to his custody. First, with regard to divorce, it seems to be clear from the authorities on Mohammedan Law that a "Khula" divorce is obtainable at the initiative of the wife. It is accomplished at once by means of appropriate words spoken or written by the two parties or their respective agents, the wife offering and the husband accepting compensation out of her property for the release of his marital rights. In the present case, although Husein did not appear before the court at any stage of the proceedings, it would seem that his father El Haji Salum had throughout been acting as his agent and that the divorce which was accomplished through the intervention of the court was a proper "Khula" divorce.

It is also clear that there is outstanding a part of the dower which has not yet been returned to El Haji Salum who paid it. As to the validity of the divorce, when the consideration for the "Khula" has not been completed there would seem to have been a difference of views amongst some of the authorities. Fitzgerald in his book on Mohammedan Law (1931) at pages 78 and 79 refers to the case of *Lalli v. Asha* (1914), 5 E.A.L.R. 165, in which it was implied that the divorce was not operative till the release money (Ewaz) had been paid. I have not been able to refer to this case, but Fitzgerald considers that the finding was not necessary to the decision in the case and the view taken in *Suddan v. Faiz Baksh* (1920), 1 Lah. 402 and *Bazul ul Raheem v. Luteefut oon Onnissa* (1861), 8 Moo.I.A. 378, is preferable. This Court would find it difficult to accept the view that the divorce was not operative until the release money had been paid in the absence of reliable authority to that effect. To the contrary is Tyabji who, in his Principles of Mohammedan Law (1919), 2nd Edn., states at s. 181 that in the absence of express agreement for payment of the consideration for a "khul", it will be payable immediately but the dissolution of the marriage is not contingent on the payment of the consideration. To similar effect is Wilson's Anglo-Mohammedan Law (1930), s. 70. Hence, on the two questions as to whether there had been a valid divorce and whether the "Ewaz" or consideration for the "Khula" divorce had been paid, I am of the opinion that there was a valid divorce and that that part of the "Ewaz" which remains unpaid should be recovered or claimed from Asumini or her father as a civil debt.

Turning now to the questions of parentage and custody, there would seem

to have been a misdirection by the learned District Magistrate on the question of Abasi's legitimacy. According to the authorities which this Court has been able to consult – Tyabji in his Principles of Mohammedan Law, 2nd Edn. (1919), Wilson's Anglo-Mohammedan Law by A. Yusufali (1930), and Fitzgerald on Mohammedan Law (1939) – a child born after six lunar months from the date of the marriage is conclusively legitimate. In other words, the allegation by Asumini in her testimony of the impotence of Husein might be grounds for a judicial divorce but could not rebut the presumption that the children born during her lawful wedlock with Husein were his. It follows, therefore, that the learned magistrate should have directed himself that upon the evidence Abasi was the legitimate son of Husein.

As to custody of Abasi, as he is a child of only one year of age, his mother is entitled to his custody, which the majority of the various schools agree, in the case of a male child shall last until the age of seven years. The order of the primary court that his custody should be forfeited by Asumini should she reside at a distance from Husein's or her father Robesi's place of residence would seem to be in accordance with the Mohammedan Law – see Wilson at s. 108 where there is also cited another rule of Mohammedan Law which would deny custody to the mother in case she is taken in marriage by another man. It is well established in these courts that the welfare of the child in cases of custody is the paramount consideration. What must be considered is whether it is in the best interest of the child Abasi that he should live with his mother Asumini who appears to be determined to live neither with Husein, whom she has divorced, nor with her father Robesi, with whom she has not been living for the past three years, but with her new lover at Nkalinzi.

It is to be observed that Husein, Abasi's father, has not appeared in any of the court proceedings and it is nowhere indicated in the record whether his non-appearance was due to indifference or to indisposition. Be that as it may, Abasi's paternal grandfather El Haji Salum has throughout manifested his interest in him. Hence, this Court sees no reason to interfere with the discretion exercised by the primary court in making its order of January 30, 1968 insofar as it relates to paternity and custody of Abasi.

For these reasons, the appeal is allowed and the judgment of the primary court is restored.

Appeal allowed.

No appearance for the appellant or for the respondent.

Gomes and others v Attorney-General Uganda
[1969] 1 EA 259 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	20 December 1968
Case Number:	657/1966 and 672/1966 (7/69)
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Damages – Personal injuries – Assessment – Plaintiff injured in collision – Brain damage leading to change in personality and impairment of academic ability.

Editor's Summary

The plaintiff, a student at St Mary's College, Kisubi, and another were injured when a school bus, in which they were travelling, collided with an army lorry driven by the servant of the defendant. The court found that the defendant's driver was negligent and went on to consider the damages. The surgeon's report stated that the plaintiff had sustained severe brain damage leading to a change in personality and an impairment of academic ability. The possibility of the occurrence of epilepsy was estimated at ten per cent in the report; but on a further examination three months later, the surgeon reduced the estimated possibility to three per cent. The other plaintiff had sustained a brain contusion, resulting in unconsciousness for about a week and he had also suffered lacerations on the ear and face. He was in hospital for three weeks and, at the time of the trial, still suffered from headaches.

Held –

(i) a fair award for the plaintiff would be £2,250 with interest and costs;

(ii) for the other plaintiff, £1,000 with interest and costs.

Judgment for the plaintiffs.

Cases referred to in judgment:

(1) *Wheten v. The Lord Mayor, Alderman and Citizens of Cardiff* (1953) C.A. No. 286 (unreported).

Judgment

Sheridan J: The judge summarized the facts and then proceeded:] I accept the evidence of the plaintiff's and the third party's witnesses, which satisfies me that the defendant's driver was entirely to blame for this collision. The bus was being driven on its correct side of the road when the army lorry, being driven too fast, in a zigzag manner and with its lights undipped, careered into the side of the bus and overturned it. In reaching this conclusion I am not influenced by the fact that in *Fausitin Iyama v. The Attorney-General of Uganda and Anor*. (High Court Civil Suit No. 334 of 1965) the defendant settled a claim by the fathers or benefactors of ten of the deceased students for £5,000.

It follows that the defendant's claim against the third party is dismissed with costs, including the costs of the third party proceedings.

There remains the difficult question of damages.

Mr J. J. Shepherd, F.R.C.S., Honorary Consultant Surgeon at Mulago Hospital, received Gomes there on November 15, 1964 after an emergency tracheotomy had been performed on him at Entebbe Hospital. He was unconscious, and remained so for nine days. There was a large bruise over the left side of the head and an X-ray showed a fracture in this region. The diagnosis

was that widespread brain damage had occurred as a result of a blunt injury to the skull. On December 11, 1964 he was discharged home. Mr Shepherd's report, which gives details of the treatment administered to Gomes, dated June 6, 1966, concludes:

> "The length of time that this boy remained unconscious indicates a severe degree of brain damage. The change in personality and the impairment of academic ability must definitely be attributed entirely to his injury. Another common sequel of an injury of this type is for a patient to develop epilepsy some years later. Fortunately, so far this patient shows no sign of this complication, but in assessing compensation for his injuries it should be said that there is a 10 per cent possibility of its later appearance."

Mr Shepherd last saw Gomes about three months ago. He considers that after a lapse of four years the possibility of epilepsy is now only three per cent. In his opinion Gomes's voice is not as deep as it should be, for a young man of 20; this is attributable to the tracheotomy.

Brother David, the headmaster of the College, speaking from the records, describes Gomes as a relatively good student when he entered in 1963. Statistics are not much of a guide but it appears that his academic career was retarded by about a year and that learning does not come to him as easily as it did before the accident. The only authority to which I was referred was *Wheten v. The Lord Mayor, Aldermen and Citizens of Cardiff* (1953), C.A. No. 286, October 15, 1953, cited in Kemp and Kemp The Quantum of Damages, Vol. I (2nd Edn.), p. 230. There, a 13-year-old boy was thrown from a bus and sustained a severe injury to the frontal bone in the head and also an actual loss of brain tissue. He was three weeks in hospital and three months away from school. It would be necessary for him to have an operation when he finished growing, to give some protection to the front of his head. There was a ten per cent possibility of epilepsy developing at some later date. In upholding an award of £2,250 general damages, the Court of Appeal *per* Morris, L.J. said: "In a case of this kind, involving head injuries, with all the uncertainties, the learned Commissioner did the best he could." The injuries to Gomes were probably more serious, but he is not confronted with an operation in the future, and the chances of epilepsy supervening have diminished. I think that £2,250 would be a fair award.

Kyewalyanga sustained a brain contusion, resulting in unconsciousness for about a week, and lacerations on the right ear and face. On December 9, 1964 he was discharged from hospital. Since then he has at times behaved irrationally and complains of headaches. His academic record, both before and after the accident, was poor. In the opinion of Mr Kyalwazi, F.R.C.S., Senior Consultant Surgeon at Mulago, he sustained a severe head injury although there was no fracture of the skull. I award him £1,000.

There will be judgment against the defendant for Gomes for £2,250 with interest and costs, and for Kyewalyanga for £1,000 with interest and costs.

Judgment for the plaintiffs.

For the plaintiffs:
L Sebalu
Sebalu & Co, Kampala

For the defendants
VWK Nykabwa
Attorney-General, Uganda

For the third parties
RE Hunt
RE Hunt, Kampala

Shah v Attorney-General Uganda
[1969] 1 EA 261 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	13 December 1968
Case Number:	366/1968 (10/69)
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Agency – Secret profit – Whether a person appointed to secure a financier had taken a secret profit – Plaintiff also a shareholder in the company acting as financier – Whether plaintiff was taking a secret profit as an agent.

[2] Constitutional law – Abolition of the Kingdom of Buganda – Whether contracts made by the Government before such abolition were frustrated by that event – Local Administrations Act (*No.* 18 *of* 1967), *s.* 58 *and Schedule* 4, *Part II, para.* 2 (*a*) (*U.*).

[3] Contract – Consideration – Commission – Plaintiff entitled to commission on the introduction of a financier who signed a contract with the Buganda Government – Rate of commission to be 2¼ *per cent – Whether this rate unconscionable – Whether under influence must be shown.*

[4] Contract – Frustration – Supervening event – Change of Government – Contract entered into with the former Government of Buganda – Plaintiff entitled to commission on the introduction of a financier who signed an agreement with the Government – Whether the plaintiff's commission had accrued before the events which frustrated the contract occurred.

Editor's Summary

The plaintiff, under an agreement of December 29, 1965 made between him and the Kabaka's Government, undertook to introduce a financier to enter into a contract with the Buganda Government to finance development projects to the limit of £300,000. The plaintiff was to be entitled to a fee of £6,750, payable in two instalments; the first instalment to be paid on the signing of the agreement between the plaintiff and the Government and the second instalment to be paid on the signing of the agreement between the financier and the Government. The plaintiff duly introduced a financier, in the shape of a company in which he was a shareholder. The first instalment was duly paid and the agreement between the financier and the Government was signed on January 20, 1966. The second instalment was not paid. It was common ground that the agreement between the financier and the Government was never implemented because of the events of May, 1966, which led to the disappearance of the Kingdom of Buganda. The plaintiff sued the defendant for payment of the second instalment of the agreed fee. The

defences pleaded were (i) that the contract had been frustrated by the events leading to the disappearance of the Kingdom of Buganda and the fact that the projects referred to in the agreements were suited only to the needs of the defunct Kingdom so that the defendant, the Government of Uganda, had not succeeded to any liability on the contract under the provisions of the Local Administrations Act, Schedule 4, Part II, para. 2 (*a*); (ii) that the consideration payable to the plaintiff was unconscionable and that the instalment already paid was sufficient consideration; (iii) that the plaintiff had not carried out the covenants and agreements on his part contained in the agreement; (iv) that the plaintiff being a shareholder in the financier company had made a secret profit to which he was not entitled.

Held –

(i) there was no evidence that the rate of commission was excessive and, even if it was excessive, the defendant, in order to show that the consideration

was bad, must prove something amounting to undue influence and this had not been done;

(ii) although the plaintiff was a shareholder in the financier company, he was not the agent of the Government and therefore he had taken no secret profit in breach of his agreement with the Government;

(iii) the agreement between the financier and the Government may have been frustrated but it did not follow that the plaintiff's commission agreement must also be frustrated.

Judgment for the plaintiff with costs.

Cases referred to in judgment:

(1) *Bentley v. Craven* (1853), 104 R.R. 375; 52 E.R. 29.

(2) *Salomons v. Pender* (1865), 34 L.J. (Ex) 95; 159 E.R. 682.

(3) *Andrews v. Ramsay*, [1903] 2 K.B. 635.

(4) *Erskine, Oxenford & Co. v. Sachs and Another*, [1901] 2 K.B. 504.

(5) *F. A. Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.*, [1916] 2 A.C. 397.

(6) *Metropolitan Water Board v. Dick, Kerr & Co. Ltd.*, [1918] A.C. 119.

(7) *Kahn v. Aircraft Industries Corporation Ltd.*, [1937] 1 All E.R. 757.

Judgment

Sheridan J: The plaintiff, a Kampala advocate, claims Shs. 67,500/-, being the balance due to him for work done and services rendered under a written agreement dated December 29, 1965 made between him and the former Kabaka's Government.

The relevant provisions of the agreement provide:

"(1) That in consideration of the said Advocate Agreeing to provide such contract financier to execute such development projects within the limit of £300,000/- (Three hundred thousand) the Government agrees to pay the said Advocate a sum of £6,750/- (Six thousand seven hundred fifty pounds) as agreed fee calculated at the rate of 2 ¼ per cent on the total sum of £300,000/- for the services so rendered which sum shall be paid to the Advocate in the manner hereinafter following:

(i) A sum of £3,375/- (Three thousand three hundred seventy-five) shall be paid by the Government to the Advocate on signing of this Agreement.

(ii) The balance of £3,375/- shall be paid by the Government to the Advocate on execution of the Contract Financiers' Agreement with the financier and/or 30th day of June, 1966, whichever is later.

(2) The Advocate hereby covenants with the Government that on or before the 10th day of January 1966 the Advocate shall place before the Government for execution and ratification subject to the Buganda Public Debt Law an Agreement which has been drawn between the Government and the Contract Financier broadly on the following lines namely:

(*a*) That the repayment shall be made over a period of seven years by equal yearly instalments with an interest on outstanding amount at any one time of 7½ per centum per annum from the date of

the contract.

(*b*) That the Government shall contribute a sum equivalent to 20 per cent of the total contract amount and the architect's fees and the Contract Financier shall provide the balance of 80 per cent.

(*c*) That the Government shall repay the aforesaid amount of 80 per cent of the Contractor's finance by executing promissory notes favouring the Contract Financier in the manner provided hereabove in sub-clause (*a*) which shall be authenticated by the Omuwanika and the Permanent Secretary of the Ministry of Finance.

(*d*) That the promissory notes shall be made payable on yearly basis from the date of the first certificate which shall for the purposes of executing the promissory notes be considered to be the date of the Contract.

(*e*) That the Contract Financier shall be required to enter into the building contract Agreement on negotiated price which negotiations shall be done through the Architect with the tender board authority of the Government and in case of dispute as to the reasonable price the Architect shall give his award as to the reasonable price to be charged on the relevant jobs.

(*f*) That the Contract Financier shall execute the work to the satisfaction of the Architect and the Government.

(3) The Advocate further covenants that the Contract Financier will have a good standing and ability to fulfil the contract.

SCHEDULE OF WORKS ABOVE REFERRED TO

1. Buganda Regional Police Headquarters.
2. Mengo Police Headquarters.
3. Police Lines.
4. Staff Quarters.
5. Any other projects which may be mutually Agreed."

The plaintiff's signature to the agreement was witnessed by the Attorney-General, Buganda and the affixing of the seal of the Buganda Government was witnessed by the Katikkiro and by Saulo Lubega, the Omuwanika. By an agreement dated January 20, 1966 General Financier & Construction Ltd. ("The Contract Financier, hereinafter referred to as the Company") a limited company which was incorporated in Uganda on January 5, 1966, agreed with the Kabaka's Government to build the scheduled buildings for a sum not exceeding £300,000 and to lend the Government a sum representing 80 per cent of the cost of the construction of the said works and the cost of the Architect's fees payable by the Government.

Clause (2) (iv) of the agreement provided:

> "The Contract Financier shall not be required to provide finance under this clause without its express agreement in writing after a period of two years from the date of this Agreement."

The Katikkiro and Omuwanika signed this agreement on behalf of the Buganda Government; Mr R. B. Patel and Mrs S. J. Shah, the plaintiff's wife, signed as directors of the company. They were the only two directors.

By a voucher dated January 25, 1966 the Kabaka's Government paid Shs. 67,500/- to the plaintiff, being the fee payable of the execution of the agreement for Contract Finance. There was an apparent mistake here as this is the payment being sued for. However, I have confirmed with counsel on both sides that this should refer to the first payment under clause (1) (i) of the agreement. Further, para. 5 of the Statement of Defence admits that it is the second instalment which has not been paid by Government.

Mr Lubega gave evidence that the written agreement was approved by the Lukiko as well as by the signatories. On its execution he was satisfied that

the plaintiff had performed what he had undertaken to do. It appears, curiously enough, that the Buganda Government relied on their Attorney-General as their expert in financial matters. He had reported that the company was financially sound. Mr Lubega could not recall if he had been informed that the company had been incorporated on January 5, 1966, or if the capital was Shs. 500,000/-, or if the paid-up capital was Shs. 100,000/-. He does not appear to have seen anything remarkable in the agreement being signed by the plaintiff's wife as a director.

Mr Pandya, the Assistant Registrar of Companies, gave evidence that the company was incorporated on January 5, 1966 – fifteen days before it made the agreement with the Kabaka's Government. The subscribers to the Memorandum and Articles of Association, and the directors, were Mr R. B. Patel and Mrs Shah. The plaintiff and Mrs Shah hold 50 of the 500 shares issued. Up to February 9, 1968 the plaintiff was the secretary of the company.

The only other witness was Mr Craxton, the Deputy Secretary to the Treasury, who was called in an attempt to show that the commission rate for an agent in a contract finance agreement should be three-quarters of one per cent, and that the 2 1/4 per cent charged by the plaintiff was excessive. This appeared to be so in the case of the contract for the Apolo Hotel, but there were other facts there which do not make it a reliable guide.

The defences pleaded are:

(1) that the agreement with the plaintiff has been frustrated owing to the fact that the projects referred to therein, being projects suited only to the needs of the now defunct Kingdom of Buganda, are now no longer viable;

(2) that the consideration payable to the plaintiff was unconscionable and that the payment already made is sufficient consideration;

(3) that the plaintiff has not carried out the covenants and agreements on his part contained in the agreement.

It will be convenient if I deal with these defences in the reverse order, and (2) and (3) can really be taken together.

The covenant relied upon is that the Contract Financier will have a good standing and ability to fulfil the contract. Here, of course, the onus of proving that the company did not fulfil these requirements is on the defence. The learned Solicitor-General, for the defendant, referred to dictionary definitions of "unconscionable" as being not limited to "undue influence" but as including something that is "not reasonable" or "excessive". He was unable to press the point that the rate of 2¼ per cent was excessive as there was no reliable evidence on this. Even if it was excessive, what was to prevent the Kabaka's Government from agreeing to it? It is not as if this was in the nature of a money-lending transaction which would be covered by special legislation. Here the defendant must show something amounting to undue influence. It is not suggested that the plaintiff was guilty of any misrepresentation. If he had been negotiating with a private individual, his position in relation to the company, and that of his wife, and its recent incorporation might have given rise to suspicion, but here he was negotiating openly with the full panoply of an established Government who, acting on legal advice, struck this bargain. They may have been somewhat naïve to do so without subjecting the company to closer scrutiny, but they were not subjected to undue influence. There is no evidence that the company was not capable of carrying out its undertaking. The plaintiff was paid the first instalment without demur. The provision that it was to be paid on the signing of his agreement with the Kabaka's Government might appear to be somewhat

generous.

Mr Mugerwa next submitted that as the plaintiff was the agent of the Kabaka's Government and at the same time was a shareholder in the company, which he launched to agree to construct the buildings, he has made a secret profit to which he is not entitled. Mr Mugerwa relied on *Bentley v. Craven* (1853), 52 E.R. 29. There, one of several partners was employed to purchase goods for the firm. He, unknown to his co-partners, purchased goods of his own at the market price, but he made a considerable profit thereby. It was held that the transaction could not be sustained, and that he was accountable to the firm for the profit thus made. In *Salomons v. Pender* (1865), 159 E.R. 682 an agent, employed to sell land, sold it to a company in which he was interested as a shareholder and director. It was held that he was entitled to no commission from his employer in respect of the sale. *Andrews v. Ramsay & Co.*, [1903] 2 K.B. 635, is to the same effect. If the plaintiff, as the agent of the Kabaka's Government, was acting in a fiduciary capacity, he is not entitled to retain any further commission which he must have received as a shareholder in the company: *Erskine, Oxenford & Co. v. Sachs & Anor.*, [1901] 2 K.B. 504.

The answer to these submissions is that the plaintiff was not an agent of the Kabaka's Government – except in a descriptive sense – and it was not his principal. He entered into a contract with it, but his acts were not binding on it. The plaintiff was not in breach of any covenant in his agreement with the Kabaka's Government.

In considering the defence of frustration, it is necessary to say something of the financial provisions relating to the Kingdom of Buganda in the 1962 Constitution of Uganda and the consequences of its disappearance in the 1967 Constitution of the Republic of Uganda, which was in force when this suit was filed.

Paragraph 32 (4) of Schedule I to the 1962 Constitution provided:

> "Before submitting estimates to the Lukiko the Omuwanika shall cause those estimates to be sent to the Minister of the Government of Uganda responsible for finance and the Kabaka's Government shall consider the observations of that Minister on those estimates."

It follows that even if the Minister of Finance made adverse comments on the agreement as part of the estimates, the Kabaka's Government was not required to act on them.

It is common ground that the agreement was never implemented because of the events of May, 1966 which led to the disappearance of the Kingdom of Buganda. It now consists of four Districts under the Local Administrations Act (Act No. 18 of 1967) (hereinafter referred to as "the Act"). Under s. 58 estimates have to be approved by the Minister of Finance, and approval cannot be given unless the money supplied falls within the purview of the powers of the District Administration. The services which they are required to administer are set out in Schedule I. They do not include the police, which was the subject matter of the agreement. The Kabaka's police force, which was established by s. 80 (2) of the 1962 Constitution, no longer exists (S.I. 135/68).

Although the Police Act (Cap. 312), s. 3 (5) provides for the establishment of administration police forces, this has not been done in relation to the Districts in what was formerly Buganda.

Part II of Schedule 4 to the Act provides for the succession by the Uganda Government to the assets and liabilities of the Kingdom of Buganda. Paragraph 2 (*a*) provides:

> "Any contract or agreement to which the government of the former

> Kingdom of Buganda was a party whether or not in writing and whether or not of an assignable nature shall, unless its terms or subject matter makes it impossible, have effect as if the Government had been a party to the agreement and service under any such contract shall be deemed to be continuous service."

Mr Mugerwa submitted that the agreement falls within the exception. The changes in the Constitution have frustrated the contractual obligation. The defendant, the Uganda Government, is no longer in a position to raise money for the objects which formed the consideration for the agreement. He submitted that the plaintiff's agreement to raise the money formed part of the company's agreement to finance and construct buildings for the Buganda police. Now that it has become impossible of performance, the whole object falls away. The principle is stated by Earl Loreburn in *F. A. Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.*, [1916] 2 A.C. 397 at p. 403:

> "When a lawful contract has been made and there is no default, a Court of law has no power to discharge either party from the performance of it unless either the rights of someone else or some Act of Parliament gives the necessary jurisdiction. But a Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract."

Mr Mugerwa referred to several other well-known authorities to the same effect.

Here it is argued that the parties must have contracted on the footing that the Kingdom of Buganda would continue to exist. Clause 2 (iv) of the agreement, which required the operation to be effected within two years, has been frustrated by the resulting delay: *Metropolitan Water Board v. Dick, Kerr & Co. Ltd.*, [1918] A.C. 119. Owing to supervening events the Kabaka's Government found itself unable to fulfil the purpose of the contract within the stipulated period.

Mr Wilkinson, while not conceding that the agreement has been frustrated, submitted that the plaintiff's accrued rights cannot be affected by an executive Act of State. It was the defendant's act which frustrated the contract. It was not as if it was done by the act of a third party. The plaintiff was merely asked to introduce to the Kabaka's Government a contract financier who would raise £300,000 to construct buildings. He did so and, on the company entering into contract with the Kabaka's Government, he became entitled to his commission. As far as the plaintiff is concerned it is immaterial that the company never carried out its undertaking nor was in a position to do so: see *Kahn v. Aircraft Industries Corporation Ltd.*, [1937] 1 All E.R. 757. There is no reference to the plaintiff in the agreement. The plaintiff had done all he had contracted to do to secure a contract for the Kabaka's Government but the latter, for reasons which do not concern him, was unable to go on with the matter. I do not think that because the agreement may have been frustrated, it follows that the plaintiff's commission agreement must also be frustrated. I do not see anything in its terms or subject matter which makes it impossible within para. 2 (*a*) of Part II to Schedule 4 of the Act.

There will be judgment for the plaintiff for Shs. 67,500/- with interest and costs and a certificate for two counsel.

Judgment for the plaintiff.

For the plaintiff:
PJ Wilkinson, QC and *VN Ponda*
Ponda, Asaria & Co, Kampala

For the defendant:
PJ Nkambo-Mugerwa (Solicitor-General, Uganda) and *MCL Gaiger* (Principal State Attorney, Uganda)
Attorney-General, Uganda

Republic v Ndesario
[1969] 1 EA 267 (HCT)

Division:	High Court of Tanzania at Arusha
Date of judgment:	9 April 1968
Case Number:	13/1968 (11/69)
Before:	Platt J
Sourced by:	LawAfrica

[1] Criminal Law – Theft – Thing capable of being stolen – Water – Stealing water from a furrow – Whether water can be stolen – Penal Code (*Cap.* 16), *ss.* 265 *and* 326 (1) (*T.*).

[2] Criminal Law – Theft – Water – Accused allowed to draw water at certain times – To take water at any other time was to take away a movable object which did not belong to him – Intent to deprive the owner permanently thereof – Penal Code (*Cap.* 16), *ss.* 265 *and* 326 (1) (*T.*)

[3] Water – Theft – Stealing water from a furrow – Whether water can be stolen – Accused allowed to draw water at certain times – To take water at any other time was to deprive the owner permanently of it – Penal Code (*Cap.* 16), *ss.* 265 *and* 326 (1) (*T.*).

Editor's Summary

The accused was charged with theft, contrary to s. 265, Penal Code and malicious damage to property contrary to s. 362 (1), Penal Code, in that he was alleged to have stolen water from a furrow on the first count and to have wilfully damaged the furrow on the second count. The accused had an agreement with the complainant whereunder he was allowed to draw water from a furrow which crossed the complainant's land. According to the agreement, the accused was only allowed to extract water between the hours of 6 a.m. and 9 a.m. The accused was charged with stealing water and breaking the furrow during the night of January 19, 1967. The evidence showed that the accused's wife and several others had taken water on the occasion mentioned in the charge.

Held –

(i) so long as a fluid such as water could be sufficiently appropriated to the user, it could be stolen;

(ii) the accused had no right to extract water except at the times stipulated in his agreement with the complainant;

(iii) the accused was therefore taking away a movable object which did not belong to him with the intent to deprive the owner permanently of it;

(iv) it could not be said that it was the accused who stole the water on the relevant date;

(v) with regard to the second count, the charge did not allege damage and was therefore defective.

Conviction quashed and sentence set aside.

No cases referred to in judgment

Judgment

Platt J: delivered the following reasons for the order of the Court: The accused was charged with theft contrary to s. 265 of the Penal Code on the first count and malicious damage to property contrary to s. 326 (1) of the Penal Code on the second count. On each count he was fined Shs. 100/- or three months imprisonment in default. The first count concerned the allegation that the accused had stolen water from a furrow and the second count concerned his alleged wilful and unlawful damage to the furrow. No appeal was preferred but the matter was called for revision by my predecessor, and, after argument, I quashed the conviction on each count and set aside the sentences imposed. I now give my reasons for so doing.

It appears that the accused and some associates occupied a shamba adjacent to the shamba of the complainant. A water furrow traverses the complainant's shamba and the latter has a water right to use the water from the furrow. The accused has no water right but, by a gentleman's agreement, the complainant allowed the accused to extract water from the furrow between the hours of 6 a.m. and 9 a.m. The accused was charged with stealing water and breaking the furrow during the night of January 19, 1967. If the accused had taken water during that night, he had no right to do so and, in my opinion, would have been properly convicted.

The case was set down for argument on the general principle as to whether water could be stolen. In my opinion, so long as fluid such as water can be sufficiently appropriated to the user, it can be stolen. So for instance, it has been held that gas passing through the consumer's pipes is the subject of larceny by him if he fraudulently appropriates it at a point before that at which by his contract he is entitled to use it. Similarly, it has been held that water supplied by a water company to a consumer and standing in his pipes may be the subject of larceny. (See Archbold's Criminal Pleading Evidence and Practice, 36th Edn., para. 1532, and the authorities cited there.) Applying this principle to the present case, the water passing through that furrow over the complainant's farm was permitted to be used by him in accordance with his water right. The accused had no water right to extract water except unofficially between certain hours. To extract water at any other time meant that he was taking away a movable object which did not belong to him. The water was used for irrigation and therefore his intent must have been to deprive the complainant permanently of it.

On the second count, the particulars of the charge were not sufficient. It was alleged that the furrow was damaged because all water was stopped from flowing in the furrow. Those particulars did not necessarily mean that the furrow had been damaged. In fact, the evidence suggested that the furrow had been broken and in this way the water diverted. If that was so, then the particulars ought to have been amended.

The Republic however objected to the conviction on the grounds that no evidence had been led that it was this accused who had abstracted the water and broken the furrow. There was evidence that the complainant and his employees had seen the accused's wife taking water from the furrow by means of pipes at about 9 p.m. on January 8, 1967. On this particular day (not I may say the date specified in the charge), the whereabouts of the accused is not known. The matter was reported to the police on January 14, 1967, but apparently water was again taken from the furrow on January 15, 1967. On this occasion it is not clear who had taken the water. The accused reported that the pipes had been seized but they were held at the police station. On the night of January 19, 1967 the night watchman is alleged to have

reported to the manager of the complainant's farm that the furrow had been broken by the accused and water abstracted. But the night watchman did not give evidence and so what was reported by him was inadmissible as hearsay evidence. It was

the night watchman's alleged report which was the evidence directly connecting the accused. Most of the witnesses testified that whenever they saw people taking water, it was the accused's wife or other people connected with him, and again on the occasion of January 19, 1967 it is not clear whether the accused was involved or some of these other people. Whoever it was caused serious damage to the complainant's crops.

The defence, as far as it went, suggested that the accused had been absent until January 17, 1967 when he discovered what had happened. He explains how the matter was reported to the police and of his difficulties thereafter. As his pipes had been taken, he admits using water from the furrow, but it is not clear at what time or by what method. In my opinion, the defence is not quite sufficient to say whether it was an admission of unlawful user of the water or not, and as the prosecution case against the accused rested on inadmissible evidence, it is not quite clear whether it was the accused who caused the damage to the furrow on the night of January 19, 1967 and stole the water. Of course, a charge could have been made on concrete grounds against the accused's wife, concerning the incident of January 8, 1967, and perhaps on other occasions. But as matters stand, it cannot be said that it was the accused who stole water on January 19. With regard to the second count, as the charge did not allege any damage, that count cannot be upheld for that reason.

Accordingly the convictions were quashed and the sentences imposed set aside. The fine if paid will be returned to the accused.

Appeal allowed.

No appearance for the appellant.

For the respondent:
JW Kirritta (State Attorney, Tanzania)

For the prosecution:
Attorney-General, Tanzania

Ramadhani v Republic
[1969] 1 EA 269 (HCT)

Division:	High Court of Tanzania at Arusha
Date of judgment:	5 April 1968
Case Number:	257/1967 (12/69)
Before:	Platt J
Sourced by:	LawAfrica

[1] Criminal law – Theft – From a motor vehicle – Whether this offence includes theft of a part of that

motor vehicle – Penal Code (*Cap.* 16), *s.* 269 (*c*) (*T.*).

[2] Statute – Construction – Marginal notes – Whether marginal notes may be used to assist interpretation – Penal Code (*Cap.* 16), *s.* 269 (*c*) (*T.*).

Editor's Summary

The appellant was convicted of stealing from a motor vehicle contrary to s. 269 (*c*), Penal Code. The appeal court supported the magistrate's finding that the appellant was guilty of stealing the gear-box from the complainant's car but considered the question of whether the appellant was properly convicted of theft from a motor vehicle, in that the gear-box stolen was attached to or formed part of the vehicle itself.

Held –

(i) section 269 (*c*) was intended to apply to things being conveyed by or deposited in vessels or vehicles;

(ii) the marginal note to the section, which referred to "stealing goods in transit", could be used to assist in the interpretation of the sub-section;

(iii) the offence committed was that of theft contrary to s. 265, Penal Code and that conviction should be substituted by virtue of s. 181, Penal Code.

Appeal against the conviction dismissed apart from the substitution; and appeal against the sentence dismissed.

No cases referred to in judgment

Judgment

Platt J: The appellant was convicted of stealing from a motor vehicle contrary to s. 269 (*c*) of the Penal Code and sentenced to twelve months imprisonment. He appeared at the hearing of the appeal and his arguments in court as well as those set out in his petition of appeal may generally be described as suggesting that the evidence did not support the conviction.

There is no doubt that the gear-box of a Thames Trader vehicle belonging to the court broker was removed and stolen. After considering the discrepancies in the evidence, the magistrate held that the theft had taken place on the night of May 25/26, 1967. The rest of the evidence was circumstantial but the magistrate accepted the evidence of one Jumbe that the appellant had approached him on the night of May 24, 1967, and borrowed some spanners in order to open the gear-box of a Thames Trader. According to Jumbe, although the appellant did not have work at times, he had been known to be a turn boy and to repair motor vehicles. But having received the spanners the appellant never returned them. The magistrate also accepted the evidence of one Zaphania who testified that on May 26, 1967, the appellant and a Somali youth had hired his taxi in which Zaphania had conveyed them to Seifee Soda Factory. This factory is situated near the court broker's premises. The appellant and his friend then went into the factory yard and brought out a gear-box. Zaphania did not notice the details of the gear-box so that he could not say to what kind of vehicle it belonged; but he could say that it must have come from a large vehicle. Zaphania then drove the appellant and his friend with the gear-box to the area called Majengo, where the appellant and his friend off loaded the gear-box. The appellant paid for the taxi and they all went their way. It is not known where the gear-box was taken and it has never been recovered. The magistrate did not accept the appellant's evidence which entirely denied that he had borrowed spanners from Jumbe or that he had hired Zaphania's taxi. He alleged that he had nothing to do with any gear-box and that Jumbe and Zaphania had given false evidence against him because of ill feeling.

The appellant was arrested apparently towards the end of June, 1967. It seems that Jumbe came to hear that the court broker had had a gear-box stolen from his vehicle and that from his investigations Zaphania the taxi driver was located. As the appellant had not returned the spanners, no doubt Jumbe might have been justifiably annoyed, but like the learned magistrate, I cannot see that his evidence was thereby necessarily biased. Nor can I see any reasons why Zaphania's evidence should not have been accepted. The appellant claims that he could not have gone into the factory yard because he did not work there, but the fact is that Zaphania saw him do so. The magistrate saw the witnesses and I cannot say that he was wrong in preferring the evidence for the prosecution to that of the defence.

If that is so, then I think that taking all the circumstances together, the only reasonable conclusion could be that the appellant had stolen the gear-box from the complainant's vehicle. But this is not I think evidence which would support a charge of stealing from a motor vehicle. Section 269 of the Penal Code provides as follows:

> "If a theft is committed under any of the circumstances following, that is to say –
>
> (*c*) if the thing is stolen from any kind of vessel or vehicle or place of deposit;
>
> the offender is liable to imprisonment for seven years."

The question which arises is whether the meaning of sub-s. (*c*) is that the thing stolen should be something unconnected with the vessel or vehicle but placed in it, or whether it may be a thing which is attached to and forms part of the vessel or vehicle. Reading sub-s. (*c*) as a whole, that is to say, taking into account the last phrase "or place of deposit", it seems to me that the section was intended to secure things being conveyed by or deposited in vessels or vehicles. In contrast, sub-s. (*d*) makes provision for things stolen being attached to or forming part of a railway. It could be said that the various sub-sections of s. 269 are not necessarily interrelated and that must be so. But I think the marginal note may afford some guide. It says "stealing from a person: Stealing goods in transit, etc.". The only sub-section which could sensibly refer to the theft of goods in transit is sub-s. (*c*). I have on previous occasions considered the validity of using marginal notes in the interpretation of the meaning of the corresponding section of the legislation concerned. Suffice it therefore to say, that in my opinion the modern view is that marginal notes may be used in assisting the interpretation of the relevant provision of the law. I consider the note "stealing goods in transit" clarifies the meaning of sub-s. (*c*), showing that the thing stolen must be a thing carried or deposited in or upon a vessel or vehicle.

In the instant case, the gear-box was a part of the motor vehicle itself. To steal such a part is no doubt a theft, punishable under s. 265 of the Penal Code. A theft of a part of a vehicle would not attract the more severe penalty of s. 269 of the Penal Code. It follows therefore that I should substitute a simple conviction of theft contrary to s. 265 of the Penal Code by virtue of s. 181 of the Criminal Procedure Code. Apart from this, the appeal against conviction is dismissed.

The sentence imposed was not manifestly severe. The appeal against the sentence is also dismissed.

Conviction substituted

The appellant appeared in person.

For the respondent:
JW Kirritta
Attorney-General, Tanzania

Lyasenga v Republic
[1969] 1 EA 272 (HCT)

Division:	High Court of Tanzania at Arusha
Date of judgment:	24 April 1968
Case Number:	41/1968 (13/69)
Before:	Platt J
Sourced by:	LawAfrica

[1] Criminal law – Obtaining by false pretences – Postal matter – Property in letters would pass to addressee or agent – Accused posing as agent of addressee – If fraud not detected, property passed to accused – Not offence of theft.

[2] Criminal law – Theft – Passing of property – Postal matter – Property in letters to pass to addressee or agent – Accused posing as agent of addressee – Whether property had passed to accused – Offence of obtaining by false pretences.

[3] Criminal law – Theft – Postal matter – Accused attempting to obtain possession of registered letters – Convicted of attempted theft – Convicted of wrong offence – Substitution of correct offence not possible – ss. 265, 267 *and* 381, *Penal Code* (*Cap.* 16) (*T.*).

[4] Criminal Practice and Procedure – Obtaining by false pretences – Attempt – Whether conviction of attempting to obtain by false pretences can be substituted for an offence of attempted theft – ss. 265, 267 *and* 381, *Penal Code* (*Cap.* 16) (*T.*).

[5] Criminal Practice and Procedure – Theft – Postal matter – Accused attempting to obtain possession of registered letters – Whether conviction of attempting to obtain by false pretences can be substituted for attempted theft – ss. 265, 267 *and* 381, *Penal Code* (*Cap.* 16) (*T.*).

Editor's Summary

The appellant presented two registered letter advice slips to the counter clerk at the Post Office at Moshi; the counter clerk was suspicious as to the identity of the appellant and checked with the District Court where the appellant had represented himself as working. The appellant disappeared from the scene and left the registered letter slips behind. The system used for the collection of mail at the District Court was to put the letters and slips in a box to which members of the public had access. The magistrate in the court below accepted that the appellant had wrongfully obtained possession of the slips and that was not acting on behalf of the addressees of the letters, and convicted the appellant of attempted theft of postal matter contrary to ss. 265, 267 and 381 of the Penal Code.

Held –

(i) if a person who is defrauded intends to pass the property in the thing given to the defrauder, then, if the thing given is capable of being stolen, it is a case of receiving goods by false pretences;

(ii) in cases concerning mail, if the addressee or his agent takes possession of the postal matter, the Post Office parts with the property in the matter;

(iii) the appellant purported to be the agent of the addressee and the Post Office, if the attempt had succeeded, would have passed the property in the postal matter to him;

(iv) the offence was therefore that of attempting to obtain by false pretences;

(v) it was not open to the court on appeal to substitute the correct conviction for that imposed by the magistrate on the appellant.

Appeal allowed. Conviction quashed and sentence set aside.

Cases referred to in judgment:

(1) *R. v. Gallagher* (1929), 21 Cr. App. R. 172.

Judgment

Platt J: The appellant was convicted on two counts of attempted theft of postal matter contrary to ss. 265, 267 and 381 of the Penal Code, and was sentenced to one year's concurrent imprisonment on each count. The appellant petitioned against his convictions on the grounds that the evidence against him was not reliable and did not support the convictions. Apart from this point, however, the appeal was admitted for consideration as to whether, if the facts accepted were proved, they amounted in law to attempted theft.

The magistrate found that the appellant had presented two registered letter advice slips to the witness Mwazo, a counter clerk at the Post Office in Moshi, at about 3 p.m. on the afternoon of September 5, 1967. The presentation of each slip was represented in a separate count, but both counts referred to the same transaction. It was also accepted that the appellant represented himself as being employed in the District Court at the Kilimanjaro District Council and that the magistrate had sent him to collect the letters relevant to the slips. Although the slips were signed and stamped with the Court Seal, as might be appropriate since the address indicated that the letters had been sent to the Post Office box number of the District Court, Mr Mwazo was suspicious and decided to investigate the appellant's claim to be employed by the District Court; and so referred the matter to his colleague the witness Sangawe. On being told that the appellant did not work at the District Court, Mr Mwazo went to report the matter and Mr Sangawe saw the appellant leaving the Post Office with a last backward glance, and without the slips. The appellant was arrested.

[His Lordship considered the evidence, and continued:] In all the circumstances, I cannot say that the magistrate was wrong to accept the evidence of the prosecution in preference to the defence. Accordingly I find no ground for disturbing his findings of fact.

Passing on then to the points of law raised by these facts, the first question is whether the appellant could properly be convicted of attempted theft. I think that the answer must be in the negative as the Republic conceded. It is well established law that to base a conviction on theft the possession may pass to the thief in the goods stolen, but not the property. If the person defrauded intends to pass the property in the thing given to the rogue, then if the thing is capable of being stolen, it would be a case of receiving goods by false pretences. In cases concerning mail, the Post Office intends to deliver the property in the mail, on behalf of the sender to the addressee. If then the addressee or his agent takes delivery of the letters, the Post Office has divested itself of all interest and property in it. There may sometimes be cases where the Post Office delivers a letter or other postal matter by its own agent or servant, and if the latter converts the postal matter to his own use, that will be theft; because the Post Office still has the property in the postal matter, while it is in the hands of its agent. But, in this case, the appellant posed as the servant of the court to whose care the postal matter had been addressed. The Post Office therefore could not have insisted that the appellant was its agent; he must have been the agent through the court of the addressee. Had the appellant's fraud not been detected, the Post Office would have parted with the property in the two letters relevant to the slips. The offence stood to be one of obtaining the letters by false pretences, and not theft.

The second question then is whether the appellant's action amounted to attempting to obtain the letters by false pretences. Section 381 of the Penal

Code provides that when a person intending to commit an offence begins to put his intention into execution by means adapted to its fulfilment and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to have attempted to commit the offence. The second part goes on to provide that it is immaterial whether the offender does all on his part that is necessary for completing the commission of the offence. In the present case, the appellant had done all that he could do to complete the offence. He had presented the slips and put forward a false pretence in order to induce Mr Mwazo to deliver up the letters. There is no doubt that the appellant's actions had passed from mere preparation to an attempt to obtain the letters by false pretences.

The third matter raised more difficulty, and it is this: as the appellant was charged and convicted with attempted theft, has this court jurisdiction to substitute a conviction for attempting to obtain the letters by false pretences? No doubt, s. 187 (1) of the Criminal Procedure Code provides that when a person is charged with stealing anything, but the court is of the opinion that he is not guilty of that offence but of obtaining the thing in respect of which he is charged by false pretences contrary to s. 302 of the Penal Code, he may be convicted of the latter offence although he was not charged with it. Further it is clear that when a person is charged with an offence, he may be convicted of having attempted to commit that offence, although he was not charged with attempt (s. 182 of the Criminal Procedure Code). But the question is whether s. 187 (1) is wide enough to admit the substitution of attempting to obtain the thing by false pretences for the charge of attempted theft. It would seem at first sight that as the full offence of stealing or obtaining can be substituted for the other, then as each offence need not be fully proved but a conviction for the attempt may be substituted for the full offence, therefore the greater would include the less, and consequently attempted stealing or obtaining could be substituted one for the other. But there is English authority to the contrary (see Archbold Criminal Pleading Evidence and Practice, 36th Edn., para. 1498, and *R. v. Gallagher* (1929), 21 Cr. App. R. 172). Unfortunately I have not been able to study that decision as it is not available to me here. But I have little doubt that it is based on the ground that an attempt to commit a crime is itself a crime different in substance and often punishment to the full crime. The general principle is that no one should be convicted for that which he has not been charged. To this principle there have been provided in this country statutory exceptions of which ss. 181 to 189 inclusive of the Criminal Procedure Code are examples. If it were not for these exceptions, no substitution of convictions would be possible. Inasmuch, therefore, as no statutory exception has been provided for the substitution of an attempted theft by a conviction for an attempted obtaining by false pretences of the thing concerned, it is not open to this court to substitute the proper conviction for that imposed by the magistrate in this case. The strength of the argument that everything depends upon statutory exception perhaps may be seen in the case of theft and receiving stolen property. There may be substitution for theft by receiving but not vice versa, and this applies to other crimes as well. Until the legislature therefore deems it proper to provide an exception in the case of attempts, which perhaps might well be appropriate, it will be necessary for the prosecution to add alternative counts.

In the result therefore the appellant was charged and convicted of the wrong offence, and the appeal must succeed. The conviction is quashed, sentence set aside, and the appellant is to be set at liberty forthwith unless held for any other lawful cause.

Appeal allowed.

No appearance for the appellant.

For the respondent:

JW Kirritta (State Attorney, Tanzania)
Attorney-General, Tanzania

Republic v Modest and another
[1969] 1 EA 275 (HCT)

Division:	High Court of Tanzania at Mwanza
Date of judgment:	19 July 1968
Case Number:	26/1968 (15/69)
Before:	Seaton J
Sourced by:	LawAfrica

[1] Criminal law – Abduction – Schoolgirl – Complainant a schoolgirl between the age of 10 *and* 12 *years – Whether the abduction of a "woman of any age" within s.* 133*, Penal Code applies to a girl of* 10 *to* 12 *years – ss.* 130, 133, 134, 135, 138 (2) *and* 139 (1)*, Penal Code* (*Cap.* 16) (*T.*).

[2] Statute – Construction – Interpretation – Whether abduction of a "woman of any age" within s. 133*, Penal Code applied to a girl of* 10 *to* 12 *years – ss.* 133, 134, 135, 138 (2) *and* 139 (1)*, Penal Code* (*Cap.* 16) (*T.*).

Editor's Summary

The two accused were both young men of 22 years of age. The first accused was the brother of the complainant, a girl of between 10 and 12 years of age. On April 2, 1967, the second accused paid Shs. 227/- to the father of the complainant as bridewealth for her elder sister and, on hearing some time later that this sister had married another man, the second accused demanded the return of the sum paid. The father then agreed to give his second daughter, the complainant, to the second accused and a marriage ceremony was performed on February 4, 1968, after which the complainant was taken to the house of the second accused. The complainant's father was, by this time, regarded as mentally defective and the first accused had assumed responsibility for the family. The complainant was a schoolgirl and was unwilling to be married, and when her headmaster complained to the village executive officer, the two accused were charged under s. 133, Penal Code, in that they had "with intent to marry or carnally know a girl of 12 years or cause her to be married or carnally known, did take her away and detain her against her will". The section under which the charge purported to have been framed created an offence if the person taken away or detained was a "woman of any age". The case was referred on review to the Director of Public Prosecutions, for whom the State Attorney supported the conviction.

Held –

(i) the interpretation of the word "woman" in s. 133, Penal Code, Tanzania should not necessarily follow that of the word "woman" in the Sexual Offences Act 1956 of England, as that Act creates an offence of which an essential element is the taking away or detention of the woman, either by force or for the sake of her property; further, the English Act contains an interpretation section by which the meaning of the word "woman" is enlarged;

(ii) the inclusion of the words “woman of any age” in the section of the Penal Code should not be taken to have extended the meaning of the word “woman” beyond the normal and common understanding of that word which is an adult human female;

(iii) it was reasonable to conclude that the Legislature intended to create two separate offences of abduction, one in s. 133 with respect to human females of any age over the age of 16 and another in s. 134 for unmarried human females under the age of 16;

(iv) the complainant was not therefore a “woman” in terms of s. 133; and the fact that the complainant’s father had consented to her being taken away meant that no offence had been committed under s. 134.

Convictions quashed and sentences set aside.

Cases referred to in judgment:

(1) *R. v. Prince* (1875), L.R. 2 C.C.R. 138.

(2) *Canada Sugar Refining Co. v. R.*, [1898] A.C. 735.

Judgment

Seaton J: The record of this case was called for because the sentences imposed on the two accused, namely five days and twenty days imprisonment respectively, seemed ridiculously light for the offence of abduction under s. 133 of the Penal Code.

A perusal of the record discloses that the accused are both young men of the age of 22 years and the first accused is the brother of the complainant, who is a girl aged between 10 and 12 years.

It appears that on April 2, 1967 the second accused paid Shs. 227/- to the father of the complainant as bridewealth for her elder sister. When the second accused wished to marry the elder sister her father told him to wait. Having heard in November, 1967 that the sister had married another man, the second accused went, after Christmas, to her father to demand a return of the bride-wealth and, not receiving satisfaction, reported to the elders. After discussion, the father agreed before the elders to give the second accused the hand of the complainant. The marriage ceremony was performed on February 4, 1968, after which the complainant was taken to the house of the second accused.

The complainant is a schoolgirl in Standard II, and she was unwilling to be married. It seems that her father is somewhat defective mentally and the first accused had assumed some responsibility for the younger children at home. The complainant stayed four days at the home of the second accused during which time he slept with her on the same bed but did not molest her. The headmaster complained to the village executive officer when the complainant did not return to school, and the officer arrested the two accused, against whom a charge was laid under s. 133 of the Penal Code.

The charge avers that the two accused “with intent to marry or carnally know a girl of 12 years or cause her to be married or carnally known, did take her away and detain her against her will”. On the face of it, the charge would appear to be mislaid under s. 133, because the latter section creates an offence if the person taken away or detained is “a woman of any age”. I therefore referred this case to the Director of Public Prosecutions so that he might indicate whether he wished to be heard in support of the conviction. He having indicated his wish to do so, the State Attorney has appeared and ably argued in support of the conviction.

It has been submitted by the State Attorney that, looking through the sections appearing under the general heading “Offences Against Morality” in Chapter XV of the Penal Code, it is to be noted that the female person is classified according to various age groups thus:

Section 130 speaks simply of “a woman or girl”. This is in the definition of rape.

Section 133, which creates the offence of abduction, refers to “a woman of any age”.

Section 134, which creates the offence of abduction of girls under 16, refers to a “girl under the age of 16 years”.

Section 135, which creates the offence of indecent assault on females, refers in sub-s. (1) to “any

woman or girl", in sub-s. (2) to "a girl under the age of twelve years" and in sub-s. (3) to "any woman".

Section 139 (1), which creates the offence of procuration, mentions “any girl or woman under the age of twenty-one years”.

The State Attorney points out that the words “girl” and “woman” are not defined in the Penal Code. The dictionary meaning of “woman” is “adult human female” (Concise Oxford Dictionary, 4th Edn.). “Adult”, by statutory definition, would appear to be “full age”, i.e. 18 years, according to s. 2 of the Age of Majority Ordinance (Cap. 431).

The State Attorney contended that by comparing and contrasting the expressions used in the sections cited above, the result would appear to be that, except where otherwise expressly stated, the words “woman” or “girl” connote a “human female”, hence a “woman of any age” as in s. 133 would include “any woman, any girl or girl under a specified age”. Therefore, for the purposes of s. 133, the complainant aged between 10 and 12 years is a “woman”.

The State Attorney has also pointed out that in the English Sexual Offences Act 1956, s. 17 (1) creates the offence of abduction in the following words:

> “It is a felony for a person to take away or detain a woman against her will with the intention that she shall marry or have unlawful sexual intercourse with that or any other person if she is so taken away or detained either by force or for the sake of her property or expectations of property”;

and, according to s. 46 of the Sexual Offences Act 1956, the use in any provision of that Act of the word “man” without the addition of the word “boy” or vice versa shall not prevent the provision applying to any person to whom it would have applied if both words had been used and similarly with the words “woman” and “girl”. (For citation see Archbold, 36th Edn., paras. 2873 and 2929.)

It is therefore suggested that courts should, in interpreting s. 133 of our Penal Code, give to the words “woman” or “woman of any age” the same meaning as is given to the word “woman” in the English Sexual Offences Act 1956.

With respect, however, I cannot agree that the interpretation of the words “woman of any age” in our Penal Code should necessarily follow that of the word “woman” in the English Act. In the first place, the English Act creates an offence an essential element of which is the taking away or detention of the woman either by force or for the sake of her property or expectations of property. In the second place, the English Act specifically contains an interpretation section by which the meaning of the word “woman” is enlarged.

These two provisions are absent from our Penal Code. It may also be noted in this connection that the Indian Penal Code of 1860 contained the offences of “kidnapping or abducting a woman to compel her marriage” in s. 366 in the following terms:

> “Whoever kidnaps or abducts any woman with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will or in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she would be forced or seduced to illicit intercourse shall be punished with imprisonment of either description for a term which may extend to 10 years and may also be liable to a fine.”

The Indian Penal Code also contained an interpretation section, s. 10, according to which “the word ‘woman’ denotes a female human being of any age”. If the submission of the State Attorney were accepted, it would mean that this court would in effect, by interpretation, import into our Penal Code the meaning or

definition which was specifically provided for by a section in the relevant English and Indian Acts.

Of course, our Penal Code does contain the phrase “woman of any age” whereas in the Indian and English Acts the phrase is simply “woman”. But I do not think the mere addition of those words “of any age” should be taken to have extended the meaning of the word “woman” beyond the normal and common understanding of that word; that is to say, that a woman is an adult human female. It seems to me that there is a broad grouping of human females as victims of offence under Cap. 16 into certain broad categories according to age and physical development. Examples are: (1) “Woman”; (2) “Girls under 16”; and (3) “Girls under 12 years of age”; and it would also seem to me that when the word “girl” is used it is intended to have the meaning “something between a child and a woman”, which was suggested by Bramwell, B. in the English case of *The Queen v. Prince* (1875), L.R. 2 C.C.R. 154, which involved the offence of abduction of an unmarried girl under the age of 16 years.

It may well be asked why the Legislature used the phrase “woman” or “girl” in ss. 130 (rape), 135 (indecent assault on females), 137 (defilement of idiots or imbeciles), 139 (procuration) and other sections if a single term “woman” would have included the term “girl” as well. It seems also to be significant that when the Legislature intended to create an offence where the victim was a human female in any of the stages of development or categories of age groups, as in s. 158 (incest by females), it used the phrase “female person”, the fact that the victim could be either “granddaughter, daughter, sister or mother” of the male offender clearly indicating inclusion of human females of all ages.

The State Attorney urged as an additional reason for the interpretation which he put forward the fact that in s. 2 of the First Schedule to the Local Customary Law Declaration Order 1963, the Law of Persons (Government Notice No. 279 of 1963), it states:

> “According to the provisions of the Penal Code a father is punishable if he gives his consent to the marriage of his daughter before she has had her first menstruation.”

The State Attorney submitted that the provisions of the Penal Code referred to are those creating the offence of abduction in s. 133.

With respect, however, I would have thought that the provisions referred to are more appropriately those in s. 138 (2), which creates an offence whenever the father or mother or the person having custody of the girl under the age of 12 years parts with the possession or otherwise disposes of the girl with the intention that the girl shall, while under the age of 12 years and whether with or without her consent, be carnally known by her husband or knowing it to be likely that the girl will while still under the age of 12 years be so carnally known.

It is an established rule in the interpretation of statutes that, when construing the terms of any particular provision, every clause should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject matter. See *Canada Sugar Refining Co. v. R.*, [1898] A.C. 735 and particularly *per* Lord Davey at p. 741.

On consideration of the sections of Cap. 16 and the offences created therein as a whole, it seems to me to be the reasonable conclusion that the Legislature intended to create two separate offences of abduction: (1) in s. 133 with respect to women, that is to say, “human females of any age” over 16 years of age; and (2) the second offence in s. 134 for unmarried “human females” under the age of 16 years. The rationale for such separate categories would seem

to be that “human females” under the age of 16 would normally be in the custody, charge or possession of some senior relative and would be too immature to give their own consent to marriage or concubinage whereas over that age they might be sufficiently mature. It is to be noted in this connection that although the Age of Majority Ordinance does provide that the age at which they may give their consent shall be 18, the provisions of the Age of Majority Ordinance shall not affect the capacity of any person to marry or the religious rights and usages of any class of persons or, when the law applicable is customary law, any rule of customary law which prescribes any age or condition as conferring capacity for any purpose.

For the reasons which I have attempted to set out above, it is my view that the accused persons in the present case committed no offence because the complainant was not a “woman”. Had the father of the complainant not consented to their taking away or detaining the complainant, an offence might have been committed under s. 134 of the Penal Code, provided such taking away had been unlawful. It is also possible that the second accused might have been convicted of an offence under s. 138 (1) of the Code had he not behaved with commendable restraint during the four days and nights of his honeymoon with the complainant. The first accused was recorded as saying in answer to the charge: “Yes I did cause the girl to be married. The girl did not like to be married.” He was convicted on his own plea as guilty. The second accused had stated in reply to the charge that the complainant agreed which was recorded as a plea of not guilty and evidence was heard after which he was convicted as charged.

For the reasons I have attempted to set out above, I am of the opinion that neither conviction can be sustained. The convictions are accordingly quashed.

Order accordingly.

No appearance for the accused.

For the respondent:
GS Liundi (State Attorney, Tanzania)

For the Republic:
Attorney-General, Tanzania

Seidi v Republic
[1969] 1 EA 280 (HCT)

Division:	High Court of Tanzania at Mwanza
Date of judgment:	27 June 1968
Case Number:	185/1968 (16/69)
Before:	Seaton J
Sourced by:	LawAfrica

[1] Criminal Practice and Procedure – Charge – Defect – Lack of particulars – No prejudice to the accused – Criminal Procedure Code (*Cap.* 20), *s.* 346 (*T.*).

[2] Criminal Practice and Procedure – Charge – Defect – Misjoinder of counts – No prejudice to the accused – Criminal Procedure Code (*Cap.* 20), *s.* 346 (*T.*).

[3] Traffic – Causing death by reckless or dangerous driving – Whether driver foresaw probability of death resulting from the accident – Vehicle with defective tyres and overloaded – Traffic Ordinance (*Cap.* 168), *s.* 44*A* (1) (*a*) (*T.*).

[4] Traffic – Duty of care – By driver – To passengers in a vehicle – Traffic Ordinance (*Cap.* 168), *s.* 44*A* (1) (*a*) (*T.*).

Editor's Summary

The appellant was convicted on three counts of (1) causing death by reckless or dangerous driving, (2) using a motor vehicle on the road with defective tyres, (3) was withdrawn, and (4) of carrying passengers without a licence. The appeal was against the first and second counts only. The facts were that the appellant, who was an experienced driver, at the request of one Maganga was driving Maganga's landrover to Nzega to buy petrol. Maganga had asked the appellant to carry in the vehicle twelve cases of empty bottles and eight people who were travelling to a funeral. In addition, Maganga, his son and one of his employees were in the vehicle, and on the way, the appellant picked up three more persons, who were found to have paid amounts of Shs. 5/- or Shs. 6/- as fare. After the vehicle had travelled some distance, a rear left side tyre burst and was duly repaired. Some distance further on the tyre which had replaced the earlier burst tyre also burst, causing the landrover to overturn. Three people died as a result of the accident and a further twelve were injured. There was evidence by a motor vehicle inspector that the road surface was corrugated and that the tyres were in such a condition that they could not be used on such a road surface without bursting. The State Attorney conceded that the charge, as framed, was defective in that it did not set out clearly the particulars of the charge and the facts on which the prosecution relied as constituting reckless or dangerous driving. There was, further, a joinder of counts of causing the deaths of three persons and injuring twelve others. The facts relied upon as constituting the liability of the appellant were the condition of the vehicle and the speed at which it was travelling, and these were omitted from the charge.

Held –

(i) the defects in the charge had occasioned no failure of justice and were curable;

(ii) there was no reason to limit the duty of care owed by a driver to members of the public using the road independently, and the duty was therefore also owed to passengers in the vehicle;

(iii) an experienced driver who overloaded a vehicle and drove it, despite the knowledge of defective tyres, was aware of the potential danger he was creating and his decision to go on driving in such circumstances amounted to recklessness.

Appeal dismissed.

Cases referred to in judgment:

(1) *Kamau s/o Muga v. R.*, [1963] E.A. 172.

(2) *Ally s/o Abdallah v. Republic* (Tanzania Criminal Sessions Case No. 149 of 1966) (unreported).

(3) *Andrews v. Director of Public Prosecutions*, [1937] A.C. 576.

(4) *Troughton v. Manning* (1905), 20 Cox C.C. 861.

Judgment

Seaton J: The appellant was charged on four counts: (1) causing death by reckless or dangerous driving, (2) using a motor vehicle on the road with defective tyres, (3) using a motor vehicle on road with defective brakes, and (4) carrying passengers without a licence. On the third count the appellant was acquitted and, I would respectfully agree, rightly, because there was an element of doubt whether the defect in the brakes was caused by the accident which occurred or had existed prior to the accident. He was convicted on the remaining counts, but has appealed to this court only in respect of his conviction on the first and second counts. The particulars of these counts, as set out in the charge-sheet were as follows:

"*Particulars of offence*

1*st Count*: Said s/o Sofu is charged on or about the 25th day of November, 1967 at about 12.50 hours at Iborogelo Area, along Nzega/Singida Road within Nzega District Tabora Region being a driver-in-charge of M/V TD 2957 Land-rover the property of Maganga s/o Mahona did drive the said motor vehicle TD 2957 on road recklessly and in a manner that was dangerous to the public, having regard to all the circumstances including the nature, condition and use of the road, and amount of traffic which was actually at the time or which might reasonably be expected to be on the road; to wit he over-turned the said M/V TD 2957 and killed one Nyamizi d/o Mapigano, Mbalu d/o Shikungu and Maganga s/o Kaseka and caused grave injuries to twelve passengers.

2*nd Count*: The same person charged on the same date time and place did drive an M/V TD 2957 on public road with three defective tyres to wit rear right hand tyre and left hand tyres worn out to canvas."

It appears that on November 25, 1967 the appellant was asked by one Maganga to drive the latter's landrover to Nzega to buy some petrol. Maganga had only purchased the vehicle about two months previously and was himself unable to drive it. The appellant, who is his neighbour, is a transporter and owns several lorries which he personally drives. Before setting out to Nzega to buy petrol the appellant inspected the engine of the landrover and suggested that it required spare parts for which Maganga gave the appellant Shs. 20/- in cash in addition to Shs. 220/- for the petrol. On the instructions of Maganga the appellant loaded the vehicle before setting out with twelve cases each containing 24 empty "Fanta" bottles which were collected from a certain club in the town to be taken to Nzega. Also on the instructions of Maganga, the appellant gave a lift to eight people who were going to Nzega to attend a funeral. In addition, the landrover carried Stephano, a turn-boy employed by Maganga on this occasion and Maganga's son, who was going to Nzega to inquire about a school vacancy.

According to the prosecution evidence, the eight passengers attending the funeral were allowed by Maganga to travel free. However, on the way to Nzega, the appellant picked up three more passengers and insisted on collecting fares from all of the passengers, except Maganga, his son and Stephano, who

had no money and promised to pay when they reached Nzega. The other prosecution witnesses paid amounts of Shs. 5/- or Shs. 6/-. One of the women passengers had a small child with her. The landrover proceeded some distance along the road from Maomba, Maganga's home, towards Nzega with its load of empty cases occupying the whole floor of the landrover and not less than fifteen people including the turn-boy and the driver, the appellant. Maganga's son, the appellant and a man who has since died sat in front and behind on top of the empty cases sat the other passengers.

After the vehicle had gone some distance a rear left hand tyre burst. The tyre was changed by the appellant, Stephano helping him. But it seems that the tyre which was put on in replacement of the burst tyre was itself quite worn. The appellant proceeded on his journey and it appears that the turn-boy and other passengers requested the appellant to drive more slowly because of the overcrowded condition of the landrover and because of the suffering of the child in particular who was in the vehicle. To their request the appellant replied that children and grown-ups are in the same category and he did not reduce his speed. It seems that Stephano had warned the appellant, while they were changing the tyre, that there was a protruding piece of metal from a defective spring which was touching the tyre and which Stephano suspected to be the cause of the first tyre having burst. Stephano suggested that this projecting piece of metal should be fixed. The appellant looked at it and said this would involve lowering the spring which would be done later. Therefore the landrover continued the journey in its overcrowded condition and with the projecting metal and worn tyre.

On reaching Igorogelo some distance further on, the tyre that had been replaced also burst. The landrover at that time was being driven down the slope of a hill at the foot of which was a bridge. The landrover overturned, three people died and twelve were injured. The magistrate found that the prosecution case rested mainly on the evidence of a *Gazetted* Government Vehicle Inspector. From his experience of about eighteen years, the inspector considered that the cause of the accident was overcrowding and the worn-out tyre. The most important part of his testimony perhaps was the following extract:

> "I observed the scene of the accident. The road was a downhill slope and the road surface was dry. It is a gravel surface. It was a fairly corrugated road surface. The motor vehicle was a landrover. Usual weight of landrover is 1/2 ton. The landrover of this type if licensed would carry eight people but if not only three. In my opinion the accident was caused by the worn out tyres. He must have also been driving fast. I found at the scene broken bottles and I found a drum at the scene . . . (Witness points out a hole on the rear left side tyre, which had burst causing the accident) and says that such a tyre could not be used on a corrugated road surface without bursting. I did not check the tube. This hole existed before the accident as it shows the canvas.
>
> The front left side tyre also has a hole and had a patching inside to block the hole meaning that the hole had been there before the accident. It would be unfit to be used for travelling on any road surface . . ."

and in cross-examination:

> "with tyres like these exhibits, the landrover would go far before overturning after brakes have been applied if driven at fast speed regardless of flat tyres. The same applies if the road is descending when the speed is slow – between 20 or 30 miles per hour. The slope at the scene was not very sharp . . ."

There was also the evidence of Stephano, the turn-boy, regarding the projecting piece of metal and the evidence of several prosecution witnesses that the landrover was being driven at a rapid speed and that they had protested in view of the condition of the roads, that is to say, on the feeder road there were pools of mud from recent rains and on the main road, which they subsequently entered, there was "much corrugation".

The appellant himself, giving evidence, admitted that the landrover contained the twelve cases of empty bottles and a load of passengers although he did not recall the number. He admitted that he checked the brakes and the engine of the vehicle before leaving for his journey but not the tyres. He claimed to have driven at a normal speed of 30 to 35 miles per hour during the journey and at the time of the accident he was driving at 35 miles per hour while the landrover was going downhill. He denied having taken any money from the passengers and asserted that driving at 30 to 32 miles per hour on the corrugated condition of the road at the time of the accident was safer and smoother than driving at 20 miles per hour. The learned magistrate found that the appellant had been driving recklessly and in a manner which was dangerous to the public having regard to all the circumstances including the nature, condition and use of the road and the amount of traffic thereon and found him guilty as charged.

Section 44A (1) (*a*) of the Traffic Ordinance (Cap. 168), under which the first count was laid, is a relatively new offence, having been created by an amending Act of August 1, 1964. It is similar in wording to s. 1 (1) of the English Road Traffic Act 1960, save for the addition of five words. Section 44A (1) (*a*) of Cap. 168 is set out hereunder, with the words italicised which do not appear in s. 1 (1) of the English legislation:

> "Any person who causes the death of another person –
>
> (*a*) by driving a motor vehicle on a road recklessly or at a speed or in a manner *or in such a condition* which is dangerous to the public having regard to all the circumstances of the case (including the nature, condition and use of the road and the amount of traffic which is actually at the time or which might reasonably be expected to be on the road) . . . shall be guilty of an offence . . ."

The State Attorney has conceded that the charge was defective. It did not set out clearly the particulars of the charge and the facts on which the prosecution relied as constituting reckless or dangerous driving. It joined in one count the charge of causing the death of three separate persons and the injuries of twelve others. However, the State Attorney has urged these defects of the charge do not seem to have prejudiced the appellant. He was defended by counsel and the prosecution did make clear at the trial the acts and omissions on which they relied.

With respect, I would agree with the State Attorney that the joinder of the three deaths and injuries to other persons in one count was not prejudicial to the appellant in the circumstances of this case. It is a matter for regret that the charge was so indifferently worded. For, while the particulars in the charge on the first count only refer to the reckless and dangerous manner of the appellant's driving, it would seem from the conduct of the case by the prosecution and the evidence, that at least equally important facts relied on as constituting the liability of the appellant were the condition of the vehicle and the speed at which it was driven – and these were omitted from the charge.

However, it does appear from the record of the proceedings that the appellant was fully aware of the substance of the case he had to meet and the defects in

the charge have not in fact occasioned a failure of justice. The defects are therefore curable under s. 346 of the Criminal Procedure Code.

The major points to be decided on the first count in this case were whether the deaths of the three passengers in the vehicle were caused by the appellant's manner of driving and/or the condition of the vehicle. The learned magistrate found that the deaths of only two passengers could be attributed to the accident as the third deceased, on whom no post-mortem was performed, could have died from natural causes. Therefore, it is only necessary to consider in this appeal the appellant's liability in respect of the deaths of the passengers Nyamizi and Mbalu.

According to the medical evidence the Assistant Medical Officer, Nzega, death was due in the case of Nyamizi to a very bad fracture of the skull which could have been caused by a fall or by a blunt object, and in the case of Mbalu to brain damage also due to a fractured skull, which could have been caused by a fall. Both Nyamizi and Mbulu had cut wounds, the face and left side of the latter being covered with blood and multiple bruises.

The relationship between the physical condition of a vehicle and the manner of the accused's driving on a charge of causing death by dangerous driving was considered by the Supreme Court of Kenya in the case of *Kamau s/o Muga v. R.*, [1963] E.A. 172. The relevant condition of the vehicle there considered was a mechanical defect in the steering mechanism and the case was complicated by a joinder of a count alleging drunken driving but it would appear that the reasoning of Rudd, Ag. C.J., who gave the judgment of the court, may be helpful. After pointing out that each case depends for decision upon its own facts and circumstances, the Acting Chief Justice continued (at p. 177) as follows:

> ". . . but in our opinion the decision turns solely on the question: 'Was the sudden total loss of control in no way due to any fault on the part of the driver'."

And again (at p. 178) he remarked:

> "In the case before us the facts undoubtedly disclose that there was a mechanical defect. They also disclose that the appellant was under the influence of drink to such an extent as not to be capable of proper control of his vehicle. They also disclose that the passengers became anxious by reason of the erratic movement of the vehicle. The prosecution, however, did not prove that this erratic movement was due to a cause or causes other than the mechanical defect, in other words, that the appellant was driving dangerously irrespective of the defect and that the death of his passenger was not caused by that defect but was caused by reason of dangerous driving."

For these reasons, in the case cited, the appellate court quashed the lower court's conviction of the appellant on the charge of causing death by dangerous driving.

In supporting the conviction, the State Attorney submitted that the degree of negligence required to support a charge of reckless or dangerous driving is less than that which would be required to support a charge of manslaughter. He cited in support of this proposition the case of *Ally s/o Abdallah v. Rep* (Mwanza Criminal Sessions Case No. 149 of 1966) (unreported). In that case, the accused was charged on two counts of unlawfully causing the death of Matangazo and Ngereza. The charges arose out of a motor accident in which the landrover driven by the accused came into collision with the two deceased as he drove from the ferry. The prosecution alleged that the accused was

guilty of manslaughter while the defence was that the deceased had met their death as a result of an accident without any fault on the part of the deceased. It was held by Platt, J., that the accused failed to drive in such a manner that he could stop in time or to give proper warning to pedestrians whom he might not be able to see and who might become confused and to react unwisely to the accused's attempt to pass them. But the accused's failure to take care was held to be insufficient to support a conviction of manslaughter and he was convicted of dangerous driving contrary to s. 45 of the Traffic Ordinance.

The learned judge commented on the different standards of care required as follows:

> "It remains then to decide whether the failure of the accused amounted to such recklessness that he was guilty of manslaughter or a lesser offence. It seems to me that this was a case of recklessness, using that term in the sense that the accused no doubt did not wish to hurt the deceased – there I agree with the assessors – but that he took a chance that he could pass by because they would probably move out of the road. He took a risk and that as the textbook writers point out is the classic example of recklessness (see recent edition of Kenny's Outlines of Criminal Law and Russell on Crimes). But I doubt whether it can be said that the accused's recklessness was such that he cared nothing for the pedestrians or that he was indifferent whether he hit them or not. Of course he did not simply charge into the crowd as the prosecution suggested. He had taken some steps but not enough. He was not driving initially as far as can be seen on the wrong side of the road or at an extravagant speed. There was nothing to suggest that he negotiated the curve improperly. There was in fact nothing intrinsically bad about his driving. His fault was that he took a risk in passing the people that he should not have taken and one that a prudent sensible driver would not have taken. In my view this was not such recklessness as amounted to the offence of manslaughter. Neither was this the ordinary carelessness associated with the offence under s. 47 of the Traffic Ordinance. This was a case of dangerous driving, which may include within it the element of risk."

It will be noted from the above extract from the judgment that the case cited is not quite an authority for the proposition put forward by the State Attorney. Platt, J. did observe in passing "that the new offence of causing death by reckless driving contrary to s. 44A of the Traffic Ordinance is still not within the scope of the lesser charges which may be considered in the event of manslaughter not being proved". It was not necessary for the judge to hold – and he did not expressly do so – that because the offence under s. 44A of Cap. 168 is a lesser offence than manslaughter, the degree of negligence under the latter offence must be greater.

In the leading English case of *Andrews v. Director of Public Prosecutions*, [1937] A.C. 516, Lord Atkin, delivering the judgment of the House of Lords, made the following comment on the English Road Traffic Acts:

> "Those acts have provisions which regulate the degree of care to be taken in driving motor vehicles. They have no direct reference to causing death by negligence. Their prohibitions, while directed no doubt to cases of negligent driving, which if death be caused would justify convictions for manslaughter, extend to degrees of negligence of less gravity."

However, Lord Atkin was speaking before the enactment of s. 1 of the Road Traffic Act 1960, which created the English offence of causing death by reckless or dangerous driving, similar in most respects to s. 44A (1) (*a*) of our Traffic Ordinance (Cap. 168).

The latter offence was created to fill the gap which until then existed between the offences of manslaughter and dangerous driving. What duty of care is thereby owed by motor drivers to users of the highway? It is not to drive recklessly, not to drive at a dangerous speed, not to drive in a dangerous manner and not to drive a vehicle in a dangerous condition. If the death of a user of the highway occurs as a result of the breach of this duty to take care in any of the ways specified, the driver may be guilty of an offence. Is the duty of care owed to passengers in the vehicle driven as well as to other members of the public independently using the road? It is suggested in a guide-book on Specimen Charges compiled by Frederick Southworth, a former Crown Counsel of Tanganyika, that this question be answered in the negative (at p. 183), citing a decision of Manning, J., in *Troughton v. Manning* (1905), 20 Cox C.C. 861 as a persuasive authority. The latter decision was in respect of a charge of reckless driving under s. 1 of the English Motor Car Act of 1903.

I can find no East African authority for the proposition put forward by Southworth and, in the absence of such authority, see no reason for so limiting the interpretation of "to the public" in s. 44A (1) (*a*) of Cap. 168. The question next arises whether the prosecution had discharged the burden of proving that the appellant's duty fell short of that requisite standard of care and the death of Nyamizi and Mbulu occurred as a result.

The magistrate accepted as true the evidence of the prosecution witnesses. With regard to the vehicle inspector, the learned magistrate noted that this witness was "too overconfident for an expert", nevertheless he did not think he would go to the extent of fabricating evidence. He found upon the facts that one of the substantial causes of the accident was the bursting of the rear left side tyre, that the rear left side tyre had a big hole in it and was worn out to the extent of showing the canvas; that it was in this poor state prior to the time when the accident occurred. He also found that the appellant was aware of this poor worn out condition of the tyre and from his experience with motor vehicles must have realized that it was unfit to be used on the vehicle. The magistrate also found that the appellant must have foreseen the risk of an accident by taking such a load of twelve boxes containing twenty-four empty bottles each and not less than fifteen persons. Accordingly, he found he was "reckless in driving the landrover in the condition in which it was, which was dangerous to the members of the public he was carrying". He also found that the death of two passengers Nyambizi and Mbulu was attributable to the accident. Having come to such a conclusion, he found the appellant guilty as charged on both the first and second counts.

For the reasons which I have attempted to set out above, I do not think there was any misdirection by the magistrate as to the law applicable or as to the facts of the case. In the mainland of Tanzania, it is notorious that road surfaces are poor and repair facilities few. An experienced driver who overloads a vehicle with passengers and empty bottles and persists in driving it despite knowledge of defective tyres, must be aware of the potentially dangerous situation he is creating. His decision to go on driving in such circumstances amounted to recklessness, since the appellant must as a reasonable man have foreseen the possibility or probability of death resulting from an accident occurring which would involve the closely packed human bodies and the empty bottles carried in the vehicle. His conduct amounted to a breach of the duty to take care required under s. 44A (1) (*a*) of Cap. 168. I am of the opinion that there was ample evidence, if believed, to have justified the magistrate's finding in the present case that the appellant was guilty as charged on the first and second counts.

For these reasons the appeal is dismissed and the conviction upheld. The sentence of three years' imprisonment was not excessive in the circumstances

of this case nor was the order for disqualification from holding a driving licence for the next twelve months. The sentence of one month imprisonment on the second and fourth counts to run concurrently with the first count is likewise not excessive.

Appeal dismissed.

No appearance for the appellant.

For the respondent:
GB Liundi (State Attorney, Tanzania)
Attorney-General, Tanzania

Mohamed v Republic
[1969] 1 EA 287 (HCT)

Division:	High Court of Tanzania at Arusha
Date of judgment:	19 June 1968
Case Number:	44/1968 (22/69)
Before:	Platt J
Sourced by:	LawAfrica

[1] Criminal Practice and Procedure – Sentence – Unlawful possession – Fine of twice value of trophy unlawfully possessed – Excessive – Fauna Conservation Ordinance (*Cap.* 302) (*T.*).

[2] Game – Government trophy – Whether ostrich egg shell Government trophy – Fauna Conservation Act (*Cap.* 302), *ss.* 2 *and* 47 (*T.*).

[3] Game – Trophy – Whether ostrich egg shell trophy – Fauna Conservation Ordinance (*Cap.* 302), *s.* 2 (*T.*).

Editor's Summary

The appellant was found in possession of four ostrich egg shells in respect of which he had no certificate of ownership under the Fauna Conservation Ordinance. The appellant was convicted of unlawful possession of a Government trophy and of failing to report the possession of a Government trophy; and was fined a total of Shs. 500/-. There was no evidence that the appellant had interfered with the natural increase of ostriches, and the value of the shells was given in the charge sheet at Shs. 200/-. On appeal it was argued that ostrich egg shells were not Government trophies, firstly because they were not "trophies" within the definition in s. 2 of the Act, and secondly because they were not "Government trophies" within s. 47 of the Act. It was also argued that the sentence was excessive.

Held –

(i) although an ostrich egg shell is breakable, it is durable and as it is also recognisable as a portion of an animal, it is a trophy;

(ii) the trophies were either found or were trophies in respect of which an offence under the Ordinance had been committed, since the appellant did not prove his lawful possession of them;

(iii) the appellant therefore was properly convicted of the offences;

(iv) in the circumstances the fine was excessive and would be reduced by Shs. 350/-.

Appeal against conviction dismissed.

Sentence reduced.

No cases referred to in judgment

Judgment

Platt J: The appellant was convicted of contravening the Fauna Conservation Ordinance (Cap. 302) on two counts; the first with unlawful possession of a Government trophy contra ss. 49 (1) and 53 of Cap. 302, and the second with failing to report the possession of a Government trophy contrary to ss. 48 (2) and 53 of Cap. 302, and he was fined on each count.

It was not disputed that the appellant was found in possession of four ostrich egg shells and that he had no certificate of ownership. No defence was put forward at the trial disputing these facts. The argument was whether the ostrich egg shells could properly be described as Government trophies. The magistrate held that they were, and so convicted the appellant on each count.

The grounds of appeal put forward by counsel on behalf of the appellant are as follows:

> "(*a*) The learned magistrate erred in law in holding that four ostrich egg shells are Government trophy.
>
> (*b*) The sentence imposed is excessive considering nature and value of the ostrich eggs and other circumstances relevant to the charge."

The argument on the first ground was that the ostrich egg shells were not trophies, let alone Government trophies, within the meaning of the word "trophy" as defined in s. 2 of Cap. 302. That definition reads as follows:

> " 'Trophy' means any animal, live or dead, and any horn, ivory, tooth, tusk, bone, claw, hoof, skin, feather, egg, or other durable portion whatsoever of any animal, whether processed or not, provided that it is readily recognizable as a durable portion of an animal."

Although it was conceded by counsel that the definition of trophy included an "egg", he argued that an egg must be understood to comprise the egg shell together with the matter inside, and that therefore the egg shell per se did not come within that part of the definition of a trophy. Semantically speaking perhaps counsel is right. In one sense an egg is different to the other parts of an animal specified in the definition; for it would appear that, for instance, a part of a horn is still a horn, whereas an egg shell is not the same as an egg. But in any case, the magistrate did not rely upon the term egg in the definition as covering the egg shells found in the appellant's possession. He decided that reading the definition of "animal" together with the words in the definition of a trophy – "or other durable portion whatsoever of any animal", that the egg shells in question were covered by the definition of a trophy.

Animal is defined as follows:

> " 'Animal' means any kind of vertebrate animal and the eggs and young thereof, other than domestic animals and, except as in sections 5 (1) and 17 expressly provided, fish."

It appears that the magistrate must have reached the conclusion that the egg of an ostrich must be "an animal' in itself and that therefore the egg shell was a part of it which he thought to be durable. Counsel contended that although the egg might be an "animal", the egg shell is certainly not a durable part of it. His view was that it was easily broken and I suppose the argument would be that indeed the egg was intended to be broken by nature at the time that the young animal emerged from it. He referred me to the definition of the word durable – possibly that found in the Shorter Oxford English Dictionary. The first definition given in the dictionary is that durable means "capable of continuing in existence; persistent; permanent". The second definition given is that the thing is "able to withstand change, decay or wear".

There is no doubt, I think, that the egg of an ostrich is sufficiently comprised in the definition of the word “animal” for it to be taken to be an “animal” even though the young animal has not yet been hatched, and that the egg shell is a part of such animal at that stage of its existence. Further, after the egg has been hatched and the remains of the shell-discarded, I think it would be reasonable to hold that the discarded egg shell or parts thereof would still be a part of the animal as pertaining to that stage of its development. It appears from the argument of counsel that in this case, one shell was complete, two were more or less complete and there remained a number of pieces which might have comprised a fourth shell. Presumably therefore in the case of the first shell, life must either have been extinguished by the person who removed the contents of the egg shell or that life had already been extinguished. But it must have been a complete specimen of the animal at that stage of its development, and indeed the definition of a trophy includes animals live or dead. In the case of the more or less complete shells, and the broken pieces, the position would be ambiguous. But if I am right in thinking that, even if they had been discarded after the young animal had been hatched, they still formed a part of the animal, then the only remaining question would be whether these shells were durable parts of the animal.

According to the definition of trophy, the word durable appears to extend to parts of the animal, whether processed or not, with the proviso that such a part must be readily recognizable as a durable part of the animal. I suppose it might be taken that, if the embryo in an egg is removed from the shell, the remaining egg shell has been “processed”. It then falls for determination whether the remaining egg shell can be readily recognizable as a durable part of the animal. It is, of course, true that an egg shell may be fragile and easily destroyed; but then there are many things in ordinary every day use which are meant to endure though they are easily broken. For instance, a fine piece of china or glass is no doubt meant to be a durable object for use or ornament, even though considerable care must be taken to preserve it. Similarly it is well known that in natural history museums collections of egg shells are seen to endure or continue in existence. In the case of ostrich eggs, it is common knowledge that they are often used as receptacles or ornaments intended to endure in that state, and that with ordinary care, they are capable of continuing in existence. In my opinion an ostrich egg shell, which is of relatively strong construction, can especially be said to be readily recognizable as a durable portion of an ostrich and that therefore the magistrate came to the right conclusion in holding that the egg shells in question were trophies. Moreover, I think that this construction would conform to the spirit of the Fauna Conservation Ordinance.

But that, of course, does not conclude the matter since the prosecution had to prove that they were Government trophies. It will be seen that ss. 49 (1) and 48 (2) of the Ordinance under which the appellant was charged related to the possession of Government trophies, and therefore unless the egg shells in this case were Government trophies, his possession of them and failure to report were not offences within the Ordinance. The phrase “Government trophies” is explained in s. 47 (1) and (2) of the Ordinance. Of these provisions, it would appear that only s. 47 (1) (*b*) and (*d*) were available to the prosecution to show that these egg shells were Government trophies. It was not suggested, for instance, that the trophies were taken from a game park (s. 47 (2)) nor that the appellant had acquired the egg shells by virtue of unlawful hunting or suspected theft (s. 47 (1) (*a*), (*c*) and (*e*)). So far as I am aware, ostrich egg shells have not per se been the subject of an order describing them as Government trophies (s. 47 (1) (*g*)). Therefore there remain simply s. 47 (1) (*b*) and (*d*) which provide as follows:

> “(*b*) any game animal found dead and the trophy of any such animal or any part of any game animal which is found;

(*d*) any trophy in respect of which a breach of the provisions of this Ordinance has been committed."

The first requirement of s. 47 (1) (*b*) is that the animal should be a "game animal", but that is not necessarily required in s. 47 (1) (*d*). In s. 2 of the Ordinance "game" and "game animal" is given the meaning of "any animal specified in the First, Second or Third Schedule of the Ordinance including the eggs and young thereof". It appears quite clearly from the Third Schedule that an ostrich is a game animal, and from the definition it follows that the eggs of an ostrich are "game animals".

Sections 48 and 49 of the Ordinance are general in terms as to the manner in which an accused obtains possession of a Government trophy. The possibilities are that this appellant might have found the eggs or that they had been transferred to him by way of sale, gift or possibly for custody, or perhaps by importation. If he had merely found the egg shells then as they were the trophy or a part of a game animal, they would be Government trophies under s. 47 (1) (*b*) of the Ordinance. If they had been transferred to him by gift, sale or otherwise, then under s. 40 (3) of the Ordinance he ought to have acquired a certificate of ownership from the transferor. If the transferor had no certificate of ownership to pass to the appellant, then under s. 40 (8) there had been a breach of the provisions of the Ordinance; and so the egg shells were trophies within s. 47 (1) (*d*), thus becoming Government trophies. If they had been imported, then the appellant ought to have had necessary documents of authority to have imported them under either s. 40 (5) or (6). If he did not have such authority, then again the egg shells became Government trophies under s. 47 (1) (*d*). It is difficult to see how the appellant could have obtained possession of these egg shells in any other way and indeed he gave no explanation in his defence as to how he had acquired them. Inspector Saba gave evidence for the prosecution that when he found the ostrich eggs in the appellant's house, he asked the appellant if he had any authority permitting him to hold the egg shells, but that the appellant failed to show him any authority or certificate of ownership. Therefore the appellant was charged. On this evidence there was sufficient material for the magistrate to hold that a *prima facie* case had been made out, that the appellant was in unlawful possession of a Government trophy and that he had failed to report such possession to the nearest licensing officer or officer for the Game Division. In any event, under s. 49 (2), in any proceedings against a person for an offence for being in unlawful possession of a Government trophy, the onus of proving lawful possession lies upon the person charged. There is no doubt that the appellant put forward no explanation showing his possession to be lawful. As the magistrate held, had the appellant reported this matter to the relevant authorities, he would either have been given a certificate of ownership or been asked to surrender possession of these trophies. (See ss. 40 (1) and 48 (1).)

It follows that the appeal against convictions on each count are dismissed.

I pass on then to the second ground of appeal that the sentences imposed were excessive. On the first count, the magistrate fined the appellant Shs. 300/- or one month's imprisonment in default, and on the second count, Shs. 200/- or three weeks imprisonment in default, and these fines were paid. Counsel contended that the fines were excessive because the value of the shells given in evidence was unrealistic. That evidence, given by Mr Kalueranga of the Game Department, was that the value of a complete shell is about Shs. 100/-, although a damaged shell would be about Shs. 25/-. The witness said that he had been engaged in a sale of ostrich egg shells and that the prices had ranged from Shs. 50/- to Shs. 100/-. The value given in the charge sheet was that altogether these shells were worth about Shs. 200/-. Even if I were to accept the evidence for the prosecution, although it may be that the values were somewhat high, the

fines would still seem to me to have been too severe. There was no certainty that the appellant must in any way have interfered with the natural increase of ostriches in this country. Perhaps the police officer who investigated this case, or the official in the Game Department who gave evidence, might have asked the appellant where he had acquired these trophies. The possibility is that the appellant was relatively innocent as to interference with game in the absence of any evidence to the contrary. Had I been satisfied that the appellant had in some way actually interfered with game, the fines would not have seemed excessive. But in the circumstances of this case where the offences may have been somewhat technical, it would seem unjustified for the aggregate of the fines to reach a sum more than double the value of the trophies as given by the prosecution. Moreover, the offences in ss. 48 and 49 overlap to some extent, and had the punishments awarded been terms of imprisonment, I have no doubt they would have been ordered to run concurrently. Accordingly I reduce the fines as follows:

> On each count the appellant is fined Shs. 75/- or one month's imprisonment in default. As the appellant has already paid the fines imposed by the magistrate, Shs. 350/- will be repaid to him.

It is further ordered that the trophies shall be forfeited to the Government under s. 53 (2) (A) of the Ordinance.

Appeal against conviction dismissed. Fine reduced.

For the appellant:
Ratookumar Patel
Ratookumar Patel, Arusha

For the respondent:
JW Kiritta (State Attorney, Tanzania)

Republic v Tulali
[1969] 1 EA 291 (HCT)

Division:	High Court of Tanzania at Arusha
Date of judgment:	10 May 1968
Case Number:	55/1967 (23/69)
Before:	Platt J
Sourced by:	LawAfrica

[1] Criminal Law – Identification – Whether accused identified.

[2] Criminal Law – Intent – Whether intent to endanger safety of persons travelling by railway shown – Penal Code (*Cap.* 16), *s.* 224 (1) (*T.*).

[3] Railways – Criminal offence – Endangering safety of persons travelling on railway – Placing stones on line – Whether intent shown – Penal Code (*Cap.* 16), *s.* 224 (1) (*T.*).

Editor's Summary

The accused was charged with endangering the safety of persons travelling on a railway by placing stones on the railway line. The accused denied on oath that he was one of the persons involved.

Held –

(i) the evidence sufficiently identified the accused as one of the persons placing stones on the railway line;

(ii) the accused must have known that the stones were likely to derail the train and endanger the safety of persons travelling by the railway. He therefore had the intent necessary to support a conviction.

Accused convicted.

Cases referred to in judgment:

(1) *R. v. Gilmore* (1882), 15 Cox 85.

Judgment

Platt J: The accused, a lad of about 17 years of age, was charged on information with endangering the safety of persons travelling on a railway contra s. 224 (1) of the Penal Code. The particulars of the charge were that at about 5.15 p.m. on October 4, 1966 the accused placed stones on the railway line between Moshi and Arusha near Mshono village about ten miles away from Arusha. As this is a somewhat unusual case, I take the liberty of setting out the terms of section 224 (1):

> "Any person who, with intent to injure or to endanger the safety of any person travelling by any railway, whether a particular person or not –
>
> (1) places anything on the railway; is guilty of a felony and is liable to imprisonment for life."

On this charge then it was necessary for the prosecution to prove beyond reasonable doubt that the accused had placed the stones on the railway line, and secondly that he had done so with the intent to injure or to endanger the safety of any person travelling by the railway.

The witness Rajabu Mustafa related that on the material day he was the driver of an engineering train, proceeding to Arusha with a complement of labourers when at mile 40 from Moshi he observed three young lads sitting on the railway line. They were seated at short distances from each other, the nearest one being the accused. It appeared that they were placing stones on the railway line. He blew his whistle and stopped the train but not before the train ran over some of the stones. The driver and labourers got down from the train and the latter chased the offenders as they ran away on both sides of the tracks. The witness Hamisi Teta testified that he was one of the labourers who chased the accused as he ran away across open country in the opposite direction to his other two companions who escaped. Hamisi stated that they followed the accused for some time but within a short distance of him until he went into a house. They followed him there and apprehended him. Both these witnesses testified that they had observed the accused wearing a coat which was the same one that he wore in court during his trial, and that they were certain that the accused was one of the offenders who ran away from the railway line. He was taken back to the train and one of the stones found upon the line was retained as an exhibit and produced in court. It is fairly large stone, bigger all round than the fist of a normal man. The accused was then taken to the railway station at Arusha and so handed to the police.

During the preliminary inquiry, the accused elected to give evidence on oath which was to the effect that he had merely been grazing cattle nearby the railway line, and that, as he was a little hard of hearing, when he saw the other lads run away when chased, thinking that there might be some danger, he also ran away. But he denied having tampered with the railway line in any way. He agreed however that when he had been arrested he had been taken back to the line and there he had seen some stones still upon the line. He gave short evidence on oath in his defence to the charge against him, still alleging that he had merely been grazing cattle and that he had not interfered with the railway line.

On this evidence it was clear that stones had been placed upon the railway line, and the first question was whether the accused was one of the offenders. It appears to be true that there were some cattle grazing near the railway line but

after reviewing the evidence to the assessors they had no doubt at all that the accused was one of the lads seen sitting on the railway line. The assessors also thought that the accused had been involved in placing stones on the line. For my part I agree with the assessors. Driver Rajabu appeared to be a very reliable witness. He stated that it was where the boys were sitting that the train went over some of the stones leaving further stones upon the line. He also said that he recognised the accused. Hamisi also appeared to be a reliable witness. On the other hand it seems most unlikely that, if the accused had been three hundred yards away from the railway line grazing cattle, he would run away because of some supposed danger when the train stopped. Neither the assessors nor I believed the defence. I find therefore that the accused had been engaged with others in placing stones on the line.

The stone produced was of a size which could easily have caused the train to leave the line, and if there were several stones the danger was thereby increased. Although driver Rajabu had been able to control the train, nevertheless the accused and his companions had been engaged in an act endangering the safety of the crew and labourers travelling on the train.

The final question is whether the prosecution proved beyond reasonable doubt the accused had intended to endanger the safety of the persons on the train. It was not necessary for the prosecution to prove that the accused intended to endanger the safety of any particular person; it was sufficient that the intent was directed to any person travelling by the railway. It appeared that during the trial the assessors were scandalised by the actions of the accused. But, reprehensible as they may have been, I desired the Republic to carefully argue its case, especially having in mind that the accused was a young offender without the benefit of legal advice. Moreover, there were no local authorities upon this type of case that I could discover. The question posed for consideration was whether it was proved from the facts that the accused *must* have intended to endanger the safety of the persons travelling by the railway or whether his action might merely have amounted to mischievous behaviour without necessarily intending any damage.

The Republic submitted that, as the accused's actions were inherently dangerous, he must be presumed to have intended the natural consequences of his actions and that therefore the prosecution had proved the necessary intent. Reference was made to the corresponding law in England (see Archbold Criminal Pleading Evidence and Practice (36th Edn.) paragraphs 2689 – 2691 inclusive and the various authorities cited therein), and it was submitted that while the English law provided that putting a stone upon a railway with the intent to endanger the safety of any person travelling upon the railway was a felony punishable with a life imprisonment (see the Offences Against the Person Act 1861, s. 32), whereas any person by an unlawful act or by any wilful omission or neglect endangered or caused to be endangered the safety of any person being conveyed upon a railway would be guilty of a misdemeanour (see s. 34 of the same Act), the law in Tanzania made no distinction. Section 224 of the Penal Code taken altogether made all such acts as would come within ss. 32 and 34 of the Offences Against the Person Act 1861 a felony punishable with imprisonment for life. Therefore it must be considered that the legislature in this country had intended to provide one offence punishable with greater severity than the offences created by English statute. It was submitted that the offence had been made out within the terms of s. 224 of the Penal Code.

In the summing up to the assessors, they were directed to consider whether, on the facts, they were satisfied that the accused, a lad now of 17 years of age, without any formal education, and alleging that he did not know the likelihood of danger resulting from the stones being placed on the railway line, must

necessarily have intended to injure or endanger the safety of the persons travelling by the railway. They were to consider the possibility that the accused might not have formed this specific intent required by the section. In the event both assessors were quite clear that the accused had intended to injure people travelling by the railway.

It seems to be true that the law in Tanzania is somewhat more stringent than the corresponding law in England. At any rate, there is no corresponding provision to s. 34 of the 1961 Act. Nevertheless, whether a person does an act which endangers the safety of any person travelling by the railway, it must also be proved that the act was done with the intent to injure or endanger the safety of such person. It could be, I apprehend, that a person might do a dangerous act within the ambit of s. 224 of the Penal Code without the necessary intent. Indeed the jury declined to convict in a similar case where the accused had placed a pole on the line – see *R. v. Gilmore* (1882), 15 Cox 85. But, having given careful consideration to the evidence in this case, I am satisfied that the offence has been proved. First of all the accused was trespassing on the railway line, if he was sitting on the line and placing stones upon it. I cannot conceive that any person, even in the circumstances of this accused, would not know that this was an unlawful act. Secondly, the stone produced was of a size to be inherently dangerous, and there were several stones placed upon the line by the accused and his companions. Despite his denial, I am satisfied that the accused must have known that placing stones upon the railway line was very likely to derail the train and so endanger the safety of any person travelling by the railway. The facts seem to me to present a case where the accused has acted in a manner so inherently dangerous that the only conclusion can be that he intended the natural consequences of his actions which would be to endanger the safety of persons upon the railway. I think the facts went beyond mere negligence or mischievousness and therefore in agreement with the assessors I find the accused guilty of the charge.

Accused convicted. On probation officer's report of accused's backwardness, accused placed on probation for 18 *months.*

The accused appeared in person.

For the Republic:
JW Kiritta (State Attorney, Tanzania)

For the prosecution
Attorney-General, Tanzania

Kotak Ltd v Kooverji and another
[1969] 1 EA 295 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	12 July 1968
Case Number:	15/1968 (160/68)
Before:	Georges CJ
Sourced by:	LawAfrica

[1] Civil Practice and Procedure – Res judicata – Rent restriction – Application under Rent Restriction Ordinance, s. 19 (5) *fails on technical point – Whether subsequent identical application barred by res judicata* (*T.*).

[2] Civil Practice and Procedure – Res judicata – Technical point – Application failing on technical point of law – Whether another identical application barred as res judicata – Rent Restriction Ordinance (*Cap.* 479), *s.* 19 (5) *as amended by Rent Restriction* (*Amendment*) *Act* 1966, *s.* 16 (*c*) (*T.*).

[3] Rent Restriction – Res judicata – Application under Rent Restriction Ordinance, s. 19 (5) *fails on technical point – Whether subsequent identical application barred by res judicata* (*T.*).

[4] Rent Restriction – Retrospective effect – Amendment – Rent Restriction Ordinance (*Cap.* 479), *s.* 19 (5) *as amended by Rent Restriction* (*Amendment*) *Act* 1966, *s.* 16 (*c*) *– Whether amendment retrospective in effect* (*T.*).

Editor's Summary

On November 23, 1966 a consent order was recorded in the District Court giving the respondent landlords possession of certain business premises the subject of this action. This order was suspended until December 31, 1966. At the time the order was made, business premises were not rent controlled; but on January 1, 1967 there came into force the Rent Restriction (Amendment) Act 1966 which brought business premises under the Rent Restriction legislation. That Act amended the Rent Restriction Ordinance (Cap. 479) and replaced s. 19 (5) thereof by a new subsection which enabled applications to be made to vary suspend or rescind orders for possession. The tenant thereupon applied for such a variation order, seeking to retain possession. The application having failed before the magistrate, the tenant appealed. The appeal also failed, on technical procedural grounds (see [1968) E.A. 263]. The tenant then filed another application to vary the original consent order under s. 19 (5), and supported it with an affidavit identical to that filed by it in support of its earlier application. This second application was also dismissed, and the tenant then brought this appeal.

Held – the application was res judicata and the magistrate was right to dismiss it (although successive applications under s. 19 (5) can be made when the factual position shifts so that there is something new to be pronounced upon);

Observation obiter: the amendment was retrospective and gave the court power to review the order previously made (*Jivraj v. Devraj* (1) considered).

Cases referred to in judgment:

(1) *Jivraj v. Devraj*, [1968] E.A. 263.

Judgment

Georges CJ: On November 23, 1966, at the District Court, Dar-es-Salaam, an order was made by consent granting to the respondents – the landlords – possession of certain business premises let by them to the

appellant company. Such premises were then not under the cover of the rent control legislation. The order was conditional on the landlords' paying to the tenant Shs. 4,000/- by way of compensation, and it was suspended to December 31, 1966.

On January 1, 1967 there came into force Act No. 57 of 1966, which brought commercial premises under the protection of the Rent Acts. It was then no longer possible to obtain an order for possession of such premises unless one of the grounds specified in the Act had been established. Further, s. 16 (*c*) of the amending Act repealed s. 19 (5) of the Rent Restriction Ordinance (Cap 479) and replaced it with a new subsection which reads:

> "(*c*) by deleting subsection (5) and substituting therefore the following new subsection: –
>
> '(5) At the time of the application for the making of any order for the recovery of possession of any premises, or for the ejectment of a tenant therefrom, or, in the case of any such order which has been made, whether before or after the passing of this Act, and not executed, at any subsequent time, the court making or executing the order, as the case may be, may adjourn the application, or stay or suspend execution on any such order, or postpone the date of possession for such period or periods as it thinks fit, and, subject to such conditions (if any) in regard to payment by the tenant of arrears of rent, and otherwise as the court thinks fit, and, if such conditions are complied with, the court may, if it thinks fit, discharge or rescind any such order.' "

The term "premises" in the subsection includes commercial premises by virtue of certain amendments to s. 2 of the Principal Act.

Purporting to act under this section, the appellant company applied on January 2, 1967 for an order that the consent order recorded in court on or about December 23, 1966 be rescinded or suspended and that the defendant be allowed to continue to occupy the premises. This application came on for hearing before a Resident Magistrate in Dar-es-Salaam, who dismissed it. There is some argument as to the grounds on which it was dismissed, but principally it would seem that he held that the Act was not retrospective and that he had no power under the amended s. 19 (5) to vary or amend the order for possession. There was an appeal from this ruling, which was dismissed on technical grounds [see [1967] E.A. 348].

Immediately after the appeal had been dismissed, the tenant filed another application under s. 19 (5). This came before another Resident Magistrate. The affidavit supporting this application was identical with the earlier application, and the magistrate dismissed it on the ground that it was res judicata. He was also inclined to hold that the power to vary an order under s. 19 (5) did not apply to an order made by consent. The appeal now under consideration is from this ruling.

It is my view that the Resident Magistrate was correct when he held that the application was res judicata. Mr. Dastur for the appellant argued that the doctrine of res judicata did not apply where there was a ruling based on a point of law. It applied only where the merits of the matter had been investigated. He urged that the first ruling from which there had been an abortive appeal was not a ruling on the merits but one based on a purely legal point that the Act was not retrospective.

I am not myself convinced that the merits were never considered. Even if the ruling were based on the non-retrospective character of the Act, I am satisfied that the principle applies. The purpose of the doctrine, as I understand it, is

that there should be an end to litigation. Where a court has investigated an application and has concluded that whatever be the merits, the law provides no remedy, it cannot really be said that the application has not been determined on its merits. Re-filing the application is a way of seeking a different ruling from a court of equal jurisdiction, and avoiding the mechanism of an appeal. In this case, of course, the ruling was promptly challenged on an appeal, which proved abortive since the document was not in proper form.

Any other view, it would appear, would make nonsense of the doctrine. There would be no end of litigation. One could continue filing identical applications until one found a magistrate prepared to hold that the Act was not retrospective. Once it is decided that a particular rule of law is applicable to a particular factual situation between parties, then as far as these parties are concerned in the identical factual situation, the fact of the applicability of the rule is res judicata and can be challenged only on appeal.

This view makes unnecessary any examination of the Act in order to decide whether or not s. 19 (5) could be applied retrospectively. Suffice it to say that the reasoning of the Court of Appeal in *Jivraj v. Devraj*, [1968] E.A. 263 seems to support the finding of the learned Resident Magistrate to some extent, though on the facts the case can be distinguished.

The Act under consideration then was the Rent Restriction (Amendment) Act 1966, of Kenya, which also brought under control premises not previously covered. In that case, the landlord had filed suit for possession before the amending Act came into force. Before the defence was filed, the amending Act became effective, and the tenant claimed protection under it.

Section 13 (2) provided:

> "Any application, proceedings or other matter pending under the Principal Act before a court immediately before the commencement of this Act, may, notwithstanding this Act, be continued and determined under the principal Act as though this Act had not been enacted."

The Court held that this was clear evidence that the Act was not intended to be retrospective, and the defence could not be raised.

The views, however, on the possible retrospective effect of s. 15 (4) of the Kenya Act – which compares with s. 19 (5) of our Act – were varied. On this point, the President, Sir Charles Newbold, said:

> "I accept Mr Khanna's submission that s. 15 (4) of the Principal Act shows an intention that that section should have retrospective operation, but whether that section as amended should have retrospective operation is a matter, I think, to be determined by the amending Act and not by the Principal Act."

The view is tentatively expressed, but seems clearly to favour the non-retrospective approach.

Spry, J. A., appears to take another view. He states:

> "I am satisfied, also, that the Rent Restriction (Amendment) Act 1966 does not have retrospective operation. It is certainly not made retrospective in express terms, and I can see no such necessary implication. Section 13 indicates the reverse, and even sub-s. (4) of s. 15 of the Rent Restriction Act (Cap. 246) as amended by the 1966 Act, on which Mr. Khanna particularly relied cannot, to my mind, be properly referred to as retrospective. It is true that it refers to orders made before the passing of the Act, but not to invalidate them, but merely to give the Tribunal power in future to review them."

The learned Justice of Appeal seems to contemplate that action could be taken in future on orders passed before the Act had come into force.

Sir Clement de Lestang's view seems quite close to that expressed by Spry, J. A. He states:

> "I doubt if s. 15 (4) of the Principal Act is truly retrospective. It is true that it applies to a limited number of orders made in the past, but its purpose is clearly, I think, to provide machinery for dealing with uncompleted matters in the future."

The result of that approach is that a defendant cannot take advantage of the Act to resist an order, but if an order has actually been made against him, he can seek its variation under s. 15 (4).

The position under the Tanganyika legislation is largely similar, though there is in the amending Act – No. 57 of 1966 – a specific subsection dealing with orders. This is s. 29 (2), which provides that:

> "Every order, decision, determination or judgment of a Board, court or the High Court in any claim, application, proceedings or other matter commenced before the commencement of this Act may be enforced, and, where an appeal is lodged against any such order, decision, determination or judgment, any decision on such appeal may be enforced, in the manner provided by the law in force immediately before the commencement of this Act."

It would not appear to me that this subsection does materially alter the situation. If s. 19 (5) is retrospective in the sense that creates a power to review in futuro orders made prior to the enactment of the amendment, then it is clear that the "law in force immediately before the commencement of the Act" would have been affected by the Act to the extent that orders could be reviewed under the Act.

For these reasons, I would myself be of the opinion that the court did have power to review the order for possession made in this case.

The fact remains, however, that the relation of the transitional provisions of the amending Act to the amended s. 19 (5) is not as clear as it could be, and it would be desirable if the position were made more certain.

Holding as I do, however, that the matter is patently res judicata, I must dismiss this appeal. I should stress that this ruling ought not to be understood to mean successive applications cannot be made under s. 19 (5), but this can be done only when the factual position shifts so that there is something new to be pronounced upon and not merely the hope of a different pronouncement on the old facts.

The appellant will pay the respondents their taxed costs.

Appeal dismissed.

For the appellant:
PR Dastur
PR Dastur, Dar-es-Salaam

For the respondent:
AA Lakha
Fraser Murray, Roden & Co, Dar-es-Salaam

Gandesha v Killingi Coffee Estate Ltd and another

[1969] 1 EA 299 (HCT)

Division:	High Court of Tanzania at Arusha
Date of judgment:	9 September 1968
Case Number:	1/1968 (26/69)
Before:	Platt J
Sourced by:	LawAfrica

[1] Advocate – Witness – Procedure when advocate called as witness – Duty of advocate.

[2] Civil Practice and Procedure – Revision – Jurisdiction – Whether issue of witness summons a "case decided" – Jurisdiction to apply for revision – Civil Procedure Code 1966, *s.* 79 *and O.* 16, *r.* 1 (*T.*).

[3] Civil Practice and Procedure – Witness summons – Whether properly issued to advocate who had acted for both parties – General principles of issue discussed.

Editor's Summary

The applicant presented a petition under s. 79 of the Civil Procedure Code 1966 for the revision of an order of the Senior Resident Magistrate issuing a witness summons to the advocate for the applicant/plaintiff. The advocate had acted for both parties in the transaction out of which the suit arose.

Held –

(i) the issue of a witness summons was not a "case decided" by the court and therefore there was no jurisdiction to apply for a revision;

(ii) the magistrate had not exercised his jurisdiction to issue a witness summons illegally or irregularly.

Petition dismissed.

Cases referred to in judgment:

(1) *Muhinga Mukono v. Rushwa Native Farmers Co-operative Society Ltd.*, [1959] E.A. 595.

(2) *Hassam Karim & Co. Ltd. v. Africa Import and Export Central Corporation Ltd.*, [1960] E.A. 396.

(3) *Safi Seed Ltd. v. Ecta* (*Kenya*) *Ltd. and others* (Tanzania High Court Civil Revision No. 1 of 1967) (unreported).

Judgment

Platt J: A petition for revision has come before me in which it is prayed that the ruling and order of the Senior Resident Magistrate delivered on March 26, 1968 in the District Court of Arusha be set aside and that the respondent/defendant's application for a witness summons which was accepted by the magistrate be dismissed. This petition was made under s. 79 of the Civil Procedure Code 1966.

It appears that the appellant/plaintiff had sued the two defendants, in proceedings before the District Court, for a certain sum of money, had and received by the defendants to the use of the plaintiff; or in the alternative loss and damage by reason of the defendants' breach of condition or misrepresentation. Further, in the alternative the plaintiff claimed to recover back the money he alleged he had paid as being an advantage gained by the defendants as a result of an agreement becoming or being void because of lack of consent by the Commissioner for Lands. The plaintiff and the defendants had entered into an agreement for the sale of a farm by the defendants to the plaintiff, it being alleged that the

first defendant had covenanted that it was entitled to sell the farm. The plaintiff alleged that the first defendant was never in a position to sell the land and that therefore it was in breach of the condition, entitling the plaintiff to terminate the contract.

The defence, on the other hand, alleged that the first defendant was not in breach of condition, the second defendant not being concerned; that the plaintiff knew that the second defendant held the right of occupancy pertaining to the land which was subject to a mortgage. This the second defendant had paid off to the plaintiff's knowledge, so that all that remained was for the right of occupancy to be transferred to the plaintiff. The first defendant was a limited company of which the second defendant was managing director. As far as the monies alleged to have been paid by the plaintiff, the defendants declared that they had no knowledge of such payment. The defence attacked the plaintiff on the ground that so far from the defendants being in breach of their agreement the plaintiff had agreed to buy the farm as a tenant in common with another person but that this other person had not in fact signed the agreement. Therefore the agreement was not in such form that it could be presented to the Commissioner for Lands for his consent, it being still inchoate but not void. The defendant had undertaken to acquire the consent of Commissioner for Lands to the sale so that in the alternative if the agreement was in sufficient form, the advocate should have presented it.

These I think were the material issues relevant to this petition which were raised on the pleadings. Other matters of jurisdiction which were the subject of other rulings do not come within the ambit of this petition.

When the pleadings had been completed with a reply to the defence, the defendants applied on March 22, 1968 to the District Court for a witness summons to be issued to Mr Dev Vohora, the advocate for the plaintiff and I may say for the petitioner in this matter, requiring him to give evidence for the defendants and to produce the bank statement and all cheques and correspondence in his custody, possession or power relating to the proposed sale and discharge of the mortgage paid off by or through him. As a result of this application, an application was made in court asking the court not to issue the summons, as this would amount to an abuse of the process of the court. Reliance was placed on the commentary in Mulla's Code of Civil Procedure, to O. 16, r. 1. That commentary would be applicable to the present O. 16 r. 1. of the Civil Procedure Code 1966, and I apprehend that the principle referred to is that while the court may have little discretion in the issuing of a summons since it would not generally refuse to do so, it has power to refuse to issue a summons, in the case of applications not made bona fide and which would amount to an abuse of the process of the court. On the other hand, the defendant argued that as the advocate had acted for both sides during the negotiations, the fault of the defendants, if any, lay upon him. Consequently he was required as a witness to testify as to what had occurred. The Senior Resident Magistrate ruled that he considered that Mr Dev Vohora was a necessary witness and that it would be improper for him both to conduct the case and give evidence. Therefore he decided that Mr Dev Vohora should appear as a witness and should not act as an advocate in the case. In coming to this conclusion he relied upon passages in the judgment of Seaton, J., in *Safi Seed Limited v. Ecta* (*Kenya*) *Limited & Others*, Revision No. 1 of 1967 (unreported). As a result of this ruling the plaintiff petitions for revision on the ground that the magistrate erred in law in granting the respondent/defendants' application, thereby exercising jurisdiction not vested in him, or alternatively that he acted illegally in exercising jurisdiction vested in him or with material irregularity.

The form of the petition shows very clearly that it was an attempt to bring

the matter within the terms of s. 79 (1) of the Civil Procedure Code 1966. While I note that s. 79 (2) provides that nothing in the section shall be construed as limiting the High Court's power to exercise its revisional jurisdiction under the Magistrates' Courts Act 1963 (Cap. 537), in fact, the petition was not brought under the relevant provisions of that Act – namely ss. 38 and 39. It may well be that s. 39 (1) (*b*) gives the High Court wider powers to exercise revision than s. 79 of the Code. But I take it that as the powers in the Magistrates' Courts Act have not been prayed in aid in bringing this petition that they are therefore not relevant. I consider that I am bound to consider the application under the terms of s. 79 as prayed.

Section 79 provides that the High Court may call for the record of any case which has been decided by any court subordinate to the High Court in which no appeal lies thereto. I think it is not disputed that the ruling of the magistrate concerned an interlocutory matter, not resulting in an order from which an appeal is permitted under O. 40 of the Civil Procedure Code. It did not of course result in a decree from which an appeal would lie within O. 39 of the Code. To that extent therefore revision was competent. But by then there is the question whether this was a "case" decided by the District Court. On this thorny subject there is a great deal of divergence of views in the authorities, as to whether an interlocutory order may come within the meaning of a "case". (See *Hassam Karim & Co. Limited v. Africa Import and Export Central Corporation Limited*, [1960] E.A. 396 and *Muhinga Mukono v. Rushwa Native Farmers Co-operative Society Ltd.* [1959] E.A. 595.) While I would be prepared to say that some interlocutory orders may come within the meaning of that word, which has been held to have a wider import than the word "suit", I am not aware of an authority dealing with an order of this nature as coming within the meaning of a "case". It was an interlocutory matter, unconcerned with the final decision or that of any of the issues before the Court and was concerned entirely with a step in the procedure. It seems difficult to hold that this was a case decided. I would hold therefore that revision was not competent in this matter.

However, if I am wrong in taking that view, then I should consider whether this court has power to interfere on revision with the ruling of the magistrate by the virtue of s. 79 of the Code. In order to attack the ruling it must be shown that the magistrate either exercised jurisdiction not vested in him by law or that he exercised his jurisdiction illegally or with material irregularity.

The first question is whether the magistrate had jurisdiction to make this order. As far as the issuing of the summons was concerned, he certainly had jurisdiction. He did not consider it an abuse of the process of the court to issue the summons. That was a matter for his discretion. If it should be that he has exercised his discretion mistakenly either as to the law or the merits, that is not a matter which can be attacked on revision at this stage; though no doubt it may be a ground of appeal from the final decree. (Authority for this proposition may be found in Mulla's Commentary to s. 115 of the Code of Civil Procedure which is in the same terms as s. 79 (1) of the present Code.)

The second question is whether he exercised his jurisdiction illegally or with material irregularity. Section 79 as a whole pertains to jurisdiction including this part which refers to s. 79 (1) (*c*). At least one view seems to be that this part of the section concerns want of jurisdiction in matters of procedure. That is to say that in the exercise of its jurisdiction a court has made an order of a procedural nature which it ought not to have made. The argument would be that the magistrate acted in error by issuing the summons on Mr Vohora and thus requiring him to discontinue acting for the plaintiff. It is well established, however, by a number of authorities that it is irregular, save in exceptional cases for an advocate both to appear as counsel and to give evidence as a witness.

The principle is summed up in Halsbury's Laws of England, Vol. 3, para. 102, where it is said:

> "He should not accept a retainer in a case in which he has reason to believe he will be a witness, and if, being engaged in a case it becomes apparent that he is a witness on a material question of fact, he ought not to continue to appear as counsel if he can retire without jeopardising his client's interests."

If that be the principle, then if the magistrate considered that it would be improper for Mr Vohora to appear as an advocate and as a witness, I consider that it was his duty to require Mr Vohora to relinquish his retainer. After all an advocate is an officer of the court, and if the court considers that an improper procedure such as this is about to be taken, it ought to stop it; and in doing so I consider that it would properly act under its inherent powers in pursuance of s. 95 of the Civil Procedure Code. It may well be that the similar action taken in *Safi's* case, considered by Seaton, J., depended on s. 95 of the Code. At any rate, Seaton, J. did not approve of counsel calling himself as a witness after he had conducted the case up to the time when he applied to call himself as a witness. This had been allowed after he had handed over his brief.

But then it is argued that the questions on which Mr Vohora was asked to give evidence were not material. As far as the question why the consent of the Commissioner for Lands was not obtained that may or may not prove to be material. It may be that the agreement was discharged before the consent of the Commissioner for Lands was obtainable. That is a matter which cannot be determined at this stage. But there were other questions upon which he was required to give evidence. He had acted for both sides, and, of course, while certain matters might be privileged and others inadmissible as hearsay, there might well be matters which had been agreed upon by the parties in his presence of which he could testify; such matters might concern the undertaking as to title, the position of the tenant in common not on the record, and the payment of money for the running of the estate of which the plaintiff claimed that he had no knowledge while the defendant claimed that it was with his consent and the mortgage. It seems to me that it cannot be said that in his position as advocate for both parties his evidence could not be material to the issues at the trial.

Nor do I think that it can be said that the plaintiff's interest could be jeopardised if another advocate represented him. If it was a fact that the defendants had been in breach of their agreement or had made material misrepresentations, or if the plaintiff had paid money, though later he rescinded the agreement, those were all matters which could be represented by counsel other than himself. Certainly there was time for counsel to be instructed.

It was also argued that if the application was allowed it would lead to a convenient method of putting counsel out of the case. As I understand it advocates in this country are apparently accustomed to dealing with matters such as these for both sides. That may be, but if then a dispute arises which leads to a conflict of interest, and one party wishes to call the advocate as a witness, it seems that the proper course would be for him to act as a witness rather than as counsel for the other side. If this rule is maintained, then, while the present advocate may have to step down in this case, on other occasions other advocates may similarly have to step down, with the result that what is fair to one will be fair to all. I am also told that counsel for the respondent had on a previous occasion given evidence while he continued to act as counsel. As to that matter I say nothing because I am not aware of the circumstances in which that course was allowed. Formal matters are one thing while evidence material to the issues is another. But in any case the practice of giving evidence and conducting cases is to be discouraged.

I have therefore reached the conclusion that I cannot say that the magistrate had no jurisdiction to make the order that he did, nor that he acted illegally or with material irregularity, in exercising his jurisdiction. But as I have said I also consider that this petition for revision was incompetent. Therefore I dismiss it, leaving the matter open to be decided, if necessary, on appeal from the final decree. The respondent shall have the costs of this application.

Petition dismissed with costs.

For the petitioner:
V Dev Vohora

For the respondent:
A Reid
A Reid, Moshi

For the applicant:
V Dev Vohora, Arusha

Patel v International Motor Mart Ltd
[1969] 1 EA 303 (HCT)

Division:	High Court of Tanzania at Arusha
Date of judgment:	19 September 1968
Case Number:	13/1967 (27/69)
Before:	Platt J
Sourced by:	LawAfrica

[1] Contract – Contract of service – Termination of services – By accountant – No notice given – Employee claiming that required to perform services other than those of an accountant – Whether this amounted to a breach of contract.

[2] Damages – Contract – Breach of contract of service – Employee an accountant – Termination of employment without notice to employer – Whether substantial damages suffered as a result – Inconvenience or delay only damage.

[3] Master and servant – Termination of contract – By accountant – No notice given – Whether notice required during probationary period – What constitutes reasonable notice.

Editor's Summary

The appellant was engaged as an accountant on June 27, 1966 at a salary of Shs. 1,500/- per month on a

monthly basis for a period of six months. The appellant started work as agreed and after receiving payment for the number of days worked in June 1966, he left work on June 30, 1966 and never returned. He sent a telegram to the respondent, his employer, which stated: “Regret withdrawing my appointment, letter follows.” No letter in fact followed. The respondents were without an accountant for the months of July and August and succeeded in engaging a replacement for the appellant on August 31, 1966. The appellant argued that it was the respondents who had broken the contract of service, in that they had caused him to perform the work of a cashier and to handle insurance matters which were not within the scope of his contract as an accountant. The magistrate in the court below awarded damages to the respondents in the sum of Shs. 1,500/-.

Held –

(i) the work required of the appellant as an accountant was not unreasonable, having regard to the business of the employer and no real misunderstanding of what the work entailed could have arisen;

(ii) there was no ground for holding that the respondents had broken their contract;

(iii) the contract was not one falling within the provisions of the Employment Ordinance;

(iv) the contract was to be construed as lasting for a probationary period of six months and if the parties wished to terminate, they must give reasonable notice, which, in the circumstances, was one month;

(v) there was no distinct loss which the employer could prove, apart from delay or inconvenience and the loss of the appellant's services was not necessarily equal to the whole month's salary;

(vi) the damages should be reduced to Shs. 750/-.

Appeal dismissed (except for reduction of damages).

Cases referred to in judgment:

(1) *McLelland v. Ireland Health Board*, [1957] 2 All E.R. 129.

(2) *Nitin Coffee Estates Ltd. v. Naran Mistry*, (Tanzania High Court Civil Appeal No. 11 of 1967) (unreported).

(3) *Bowes and Partners Ltd. v. Press*, [1894] 1 Q.B.D. 202.

Judgment

Platt J: The appellant Mr Patel appeals against the judgment of the District Court of Kilimanjaro, which held that he was bound to pay Shs. 1,500/- as general damages, for unlawfully terminating his contract of service with his employers International Motor Mart Limited, the respondents to this appeal.

It is not disputed that the parties entered into a written contract dated June 27, 1966, the terms of which fall to be construed and are as follows:

> "We confirm your appointment with our company as an accountant on June 27, 1966. The starting salary is Shs. 1,500/- per month on a monthly basis for a period of six months.
>
> Please sign and return the attached copy in acknowledgement of this arrangement."

The appellant signed the document stating that he agreed to the above terms. This no doubt was a binding contract and the appellant commenced working on June 27, 1966. On June 30, 1966 he was paid *pro rata* for the days he had worked in June, but never returned to work on the next working day, July 4, 1966. Instead the respondents received a telegram which stated:

> "Regret withdrawing my appointment, letter follows."

Not surprisingly no letter followed. The respondents were now in a difficult position. The cause of the appellant's appointment was that a Mr Abraham, who had been the respondents' accountant, was leaving for India on July 9, 1966 and therefore a replacement was being sought for him. It appeared that the respondents had secured the appellant's services as such. As the appellant did not return to work, and as Mr Abraham could not delay his departure, the respondents were obliged to seek another accountant. This was not accomplished until August 31, 1966. The respondents sued the appellant for general damages flowing from the latter's breach of contract.

The first matter to be considered on this appeal is the claim put forward in the fourth paragraph of the memorandum of appeal that it was the respondents and not the appellant who had broken the contract. The appellant had pleaded in his defence in the lower court that the respondents had caused him to

perform the work of a cashier and to handle insurance matters which were not within the scope of his contract as an accountant. Therefore he had had to resign by telegram.

The learned Senior Resident Magistrate held that the respondents had not broken their contract, but that even if it were to be assumed that cashier's work and insurance work were additional duties, nevertheless, there had been no total failure on the part of the respondents entitling the appellant to repudiate the contract as a whole. The appellant now claims that the District Court erred in taking this view.

I should perhaps mention two other matters before dealing with the point of substance indicated. The first was the claim that the respondents had failed in their contract by not supplying accommodation for the appellant. As the magistrate pointed out, accommodation was not a term of the written agreement; but in fact, as we have seen, it was never pleaded as being a matter of breach of contract. It was not an issue therefore before the court and I do not take cognisance of it. The second point is that due to overwork the appellant suffered mental strain. There was no evidence to support the allegation. If it was meant that the respondents were causing the appellant to enter into such work which would endanger his health, I cannot agree. There was no evidence to suggest that the work would cause the health of a normal person to be impaired. The appellant was not entitled, in my opinion, to terminate the contract on that score. In fact, the appellant soon took up similar work elsewhere.

The question then is whether the duties of an "accountant" would exclude the duties of a cashier and insurance business. Much depends upon the business of the company or employer with which the person seeks employment as a servant. This was not a case where the appellant was joining a firm of accountants. The exact nature of an "accountant's" work would depend on the type of business and the staff which his employer was able to employ. I apprehend that in a general business an accountant would do a variety of work. As the company's name implies, it dealt in motor vehicles, which notoriously must be insured. It would not therefore be unreasonable to expect that there would be, or might be, some insurance business. There would also be matters concerned with daily cash transactions, and such things as staff remuneration. It appears that the respondents only employed one accountant who would presumably be in charge of all these matters. Now the appellant had applied for this position and had appeared for an interview with a view to securing employment with the respondent company. It must have been clear to him that he was to replace Mr Abraham. Although the exact duties which he would be required to undertake do not appear to have been discussed, apart from a general discussion of the accounts, I cannot think that the appellant could have formed any real misunderstanding as to what his work as an accountant would entail. Nor do I think that what was required of him was unreasonable. It is to be noted that when he started working with Mr Abraham, he never made any complaint nor informed the respondents that he had been under a misapprehension, and therefore felt himself unable to meet the requirements of the work. As we have seen, he wrote no letter explaining why he had terminated the work. He had put himself forward as an unqualified but experienced accountant of good general education, part of his experience being that of an actual accountant but most of his experience being gained in the running of his own business of a grocery shop in Korogwe in which he had undertaken the keeping of all his accounts. As a person with general business experience, the matters with which he was required to deal could hardly have been entirely new to him. What I suspect must have happened was that the appellant preferred other, though less salaried, employment to the responsibilities involved in the employment which he had agreed to undertake with the respondents. Like the magistrate, therefore, I cannot see my way to finding that the respondents were in breach of their contract.

The next question then concerns the manner in which the appellant should

have terminated his employment. It will be noticed at once that the terms of the written contract did not specify what notice should be given by either side, if they wished to terminate their contract. It was expressed, however, that the contract was to be for a probationary period of six months with monthly pay. The appellant argues in paragraph 3 of his memorandum that the basis of the contract was a probationary period for six months and therefore that the so-called monthly basis of the contract was superseded. Therefore no statutory notice was necessary, the parties being able to terminate the employment by instant notice. (See also paragraph 2 of the Memorandum of Appeal.) Accordingly it was argued that the magistrate should not have held that notice of one month was applicable to the circumstances of the case. I say at once that this was not a contract falling within the statutory provisions of the Employment Ordinance, Cap. 366.

The magistrate did not, as far as I can see, advert specifically to this question. He simply stated that he had no difficulty in finding that the appellant had broken the contract. But as he went on to say that as one month's wages in lieu of notice was the appropriate measure of damages for the breach, it seems to me that the necessary implication is that he held that the appellant was in breach of his contract because he had terminated the contract summarily without giving reasonable notice.

Counsel for the appellant has argued consistently throughout the proceedings that a probationary period of service means that the servant being on trial for the period stated, in the event of his work being unsatisfactory the employer may dismiss him summarily. Likewise the employee may terminate the contract summarily on finding that the terms of his employment are unsatisfactory and not to his liking. Therefore no question of notice arose. On the other hand, counsel for the respondents contended that it would be proper to imply a term that reasonable notice will be given in the absence of any expressed terms in the contract, at any rate at the end of the probationary period. To be sure, there is not much authority on the nature of a probationary period in a contract, but such as there is, in my opinion, tends to support the respondents' case rather than the appellant's. It appears that the courts have always held that except for gross misconduct and certain other matters perpetrated by one or the other side, summary termination is unjustifiable and will generally imply a term of reasonable notice. (See Halsbury's Laws of England, 3rd Ed., Vol. 25, at paragraph 945 and the "authorities thereunder".) So, for instance, the courts have accepted that in the case of domestic service where a servant has been employed on trial for one month, the servant should give notice at the end of the first fortnight as a matter of custom if he should wish to terminate the contract at the end of the month. But in the absence of custom, it would be reasonable to imply a reasonable term of notice. The nature of a probationary period was considered to some extent in *McClelland v. Ireland Health Board*, [1957] 2 All E.R. 129, where at page 133 Lord Goddard made certain observations, concerning the position of the appellant in that case during the probationary period of her service. He observed that her probationary period ended in February, 1949 and her appointment was then confirmed. He said "until it was confirmed it would have been, in my opinion, permissible for the Board to have terminated the employment at any rate on one month's notice. The object of a probationary period is to ascertain if the candidate was likely to prove efficient and as will be seen below a month's notice can be given for inefficiency." I take it that apart from actual inefficiency it would have been permissible for the Board to have given reasonable notice during the appellant's period of probationary employment, which as he observed was a period of trial at the end of which the parties might enter into a more permanent relationship. Although there were some other dicta to a similar effect given by others of the learned Lords who dealt with that case, I

must admit that the decision did not turn upon what a probationary period really consists of. But I am satisfied that I may adopt Lord Goddard's approach. It follows, I think, that during the probationary period the parties have their rights and duties, as they would in a more permanent contract, in relation to the termination of their contract, and therefore during the probationary or trial period, if they do not wish to continue with the contract they must give each other reasonable notice unless they have expressly stipulated otherwise. There is nothing in my opinion of an inconsistent nature in specifying that a servant is to be employed for a probationary period of six months on a monthly basis, that is to say the specified wages being paid at the end of each month. Accordingly I consider that the present contract is to be construed as one lasting for a trial period of six months, the appellant to be paid on a monthly basis but that if the parties wish to terminate the contract for reasons other than default, they must give reasonable notice. Having in mind all the circumstances of the case, I would say that reasonable notice would be notice of one month. It follows therefore that the appellant was in breach of his contract by terminating the contract summarily without giving such notice.

If that is so, it remains to consider what damages should be assessed, if any, for the breach of this contract. It cannot be disputed that in principle the respondents are entitled to damages if the appellant unlawfully terminated the contract. Unfortunately authority is scant, and such as there is, difficult to come by here, as to the quantum of damages. Of course, it is agreed that if the employer has suffered actual loss which can be proved, he would have damages to cover that loss; but in many cases this will not be possible. Indeed in this case the respondents were unable to prove any special loss as flowing from the breach. But it was proved that the respondents were about to lose the services of Mr Abraham who was proceeding to India and thereafter it was accepted as a fact that it was impossible to employ another suitable accountant until August 31, 1966. I should mention there that I cannot see from the evidence that the magistrate was wrong in holding that the respondents had been unable to minimise their loss. The question simply is: what was their loss?

The magistrate gave it as his opinion that the loss would be occasioned by the absence of an accountant which would cause the respondents inconvenience, and he thought that this could be quantified by reference to the wages which the respondents would have paid the appellant during the period of notice. I suppose it might be said that if the respondents considered that the appellant's services were worth Shs. 1,500/-, then, having lost those services, the appellant's salary would be the monetory equivalent of the loss. At any rate, that was counsel's argument for the respondents. On the other hand, counsel for the appellant referred me to the opinion of my brother Seaton, J., in *Nitin Coffee Estates Limited v. Narar Mistry* (Civil Appeal No. 11 of 1967) (*unreported*), in which he observed that in the absence of proof of any damage, he would only be able to award nominal damages of Shs. 40/-. In that case a mechanic employed by the appellant estate had terminated his contract of service unlawfully without notice. It was held however that he ought to have given one month's notice and the estate had claimed damages estimated at his salary for one month. There was no particular discussion as to the principles relied upon, and no authority was cited. There are cases where a party has established a right which has been infringed, thus causing him some damage, but no particular damage, where the award of nominal damages would be justified. But there are other cases where the party has suffered damage, even though it would be difficult to assess in terms of a monetary award, where he should nevertheless be granted substantial damages. There is a short discussion of this problem in *Bowes and Partners Limited v. Press*, [1894] 1 Q.B.D. 202. In that case it appears that the workman had absented himself from duty, although the breach had not

had any significant effect on the company's general business. Although the quantum of damage had been agreed, the argument was whether nominal or substantial damages should be awarded. Although Lindley, L. J. (as he then was) thought the matter difficult, he considered that substantial damages ought to be awarded and the other members of the court agreed.

I take it that each case must be examined on its own merits in ascertaining the loss and the consequent quantum of the award. While it may be that in the case considered by Seaton, J. the circumstances only justified nominal damages, I have got to consider the circumstances of the instant case. It seems to me that the respondents must have suffered considerable inconvenience which the appellant well knew would follow, and that in the circumstances I should apply the approach of Lindley, L. J. I would therefore agree with the magistrate that substantial damages should be awarded. But I do not see that a month's wages would be the necessary or appropriate quantum to award. The employer is not in the same position as an employee. It is important to note that there was no distinct loss which the respondents could prove, during the period of the absence of an accountant at the company. I take it that the work was able to proceed one way or another until another accountant had been obtained. It seems to have been only a matter of inconvenience or delay, therefore the loss of the appellant's services would not seem to have been equal to the whole of a month's salary. I would therefore assess the damages at Shs. 750/-.

Accordingly the appeal is dismissed with the exception that I would reduce the damages ordered to Shs. 750/-. As the parties have each been partly successful in the main issue, they will share the costs of this appeal. But the costs in the lower court will stand, on basis of the reduced claim before the magistrate, as the respondents were substantially successful there even on the damages now awarded.

Order accordingly.

For the appellant:
JC Patel
JC Patel, Arusha

For the respondent:
D Cassidy
D Cassidy, Arusha

Ramji v Rattansi
[1969] 1 EA 309 (HCT)

Division:	In the High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	29 November 1968
Case Number:	7/1967 (28/69)
Before:	Duff J
Sourced by:	LawAfrica

[1] Land Law – Registration – Caveat – Option – "Option" to sell registered land – Irrevocable authority to sell – Whether creates interest entitling holder to enter a caveat – Land Registration Ordinance (*Cap.* 334), *s.* 78 (1) – *Freehold Titles* (*Conversion*) *and Government Leases Act* (*Cap.* 523), *s.* 19 (1) (*T.*).

Editor's Summary

The applicant owned a plot of registered land and gave the respondent, an auctioneer, an irrevocable authority to sell it. This authority was contained in a letter, the terms of which are set out in full in the judgment. The respondent later purported to exercise his "option to purchase the property". When the applicant refused to transfer the land (on the ground that the "option" had been revoked) the respondent entered a caveat against the respondent's title under s. 78 (1) of the Land Registration Ordinance. The applicant then brought this application to remove the caveat.

Held – the letter was not an option to purchase and gave the respondent no interest in the land to enable him to enter a caveat.

Application allowed. Caveat ordered to be removed.

Cases referred to in judgment:

(1) *Oppenheimer v. Minister of Transport*, [1941] 3 All E.R. 485.

(2) *Stromdale and Ball Ltd. v. Burden*, [1952] 1 All E.R. 59.

(3) *Alibhai Mitha v. H. K. Sunderji Samji and Others* (Tanzania High Court Civil Case No. 32 of 1965) (unreported).

(4) *Crowley v. Bergtheil*, [1899] A.C. 375.

Judgment

Duff J: This is an application for the removal of a caveat entered in the Land Register under the Land Registration Ordinance (Cap. 334).

The relevant facts may be briefly stated. The applicant is the owner of a house on Plot No. 34, Laibon Road, Dar-es-Salaam. The respondent is an auctioneer to whom the applicant gave an irrevocable authority to sell the above property and this power was granted in a letter of January 5, 1966, which reads as follows:

> "In consideration of Sh. 1/- I hereby give you an irrevocable authority to sell my above said property at a price of Shs. 100,000/- (Shillings one hundred thousand only) nett.
>
> All expenses as to stamp duty, registration fees, consent fees and drawing of transfer shall be paid by the prospective purchaser.
>
> The premises at present is leased to M/S Tansco at a monthly rental of Shs. 900/- payable in advance. The lease expires on December 31, 1966. The prospective buyer has to honour this agreement.
>
> The prospective purchaser to deposit the full purchase price with his advocates who shall pay the same to me immediately upon registration.
>
> All income from the date of full payment being made to me shall be for

> the account of the prospective buyer; likewise all the out-goings from that date be paid by the prospective buyer. Where necessary adjustment shall be made on this basis.
>
> The above said price is nett to me and you should add your commission and or profit on the above. I undertake to sign and execute transfer documents at the price you are successful to sell and refund you the difference between the above said price of Shs. 100,000/- (Shillings one hundred thousand only) and the one at which the transfer documents have been signed."

From this document it will be seen that the respondent in consideration of a sum of one shilling, had the power to sell the property for any sum he saw fit (naturally in excess of Shs. 100,000/-) and at any time he deemed suitable provided that a net figure of one hundred thousand shillings was paid to the applicant.

By a letter dated August 8, 1966 the respondent's advocates intimated that their client was exercising the option to purchase the property and requested the applicant to produce the documents of title so that the transfer could be prepared and registered. In the following month the applicant's advocate replied that the option had been revoked with the consent of both parties in April of the same year, the respondent firm apparently having divested itself of any rights it might have earlier acquired. The respondent's reply to this letter consisted of a caveat being entered against the applicant's title, a notice to that effect being dispatched by the Registrar of Titles to the applicant.

Section 78 (1) of the Land Registration Ordinance provides that a person claiming an interest in any registered land may present a caveat and the question arises whether there was such an interest acquired by the respondent. Mr Lakha (for the respondent) argued that an option to purchase land was an interest in land and in support of this submission I was referred to the decisions in *Oppenheimer v. Minister of Transport*, [1941] 3 All E.R. 485 and *Stromdale and Ball Ltd. v. Burden*, [1952] 1 All E.R. 59. Mr Kassam contended (for the applicant) that before an interest in land can be acquired there would have to be a disposition which would not be operative unless and until it was approved by the Commissioner for Lands, s. 19 (1) of the Freehold Titles (Conversion) and Government Leases Act (Cap. 523) being relevant. In reply to this latter argument Mr Lakha referred me to the judgment of Georges, C. J. in *Alibhai Mitha v. H. K. Sunderji Samji and others* (Civil Case No. 32 of 1965), which discusses the position of a purchaser of land where the transfer has not been registered, the unregistered transfer not being operative to pass an interest in the land but being operative to make the person holding it in the absence of other claims indisputably entitled to have the property transferred to him. The learned Chief Justice was assisted in his deliberations by the decision in *Crowley v. Bergtheil*, [1899] A.C. 375, which was also referred to by counsel for the respondent.

The authorities cited by Mr Lakha cannot be faulted, but do they apply to the present case? The letter of August 8, 1966 refers to an option to purchase and if there was such an option I have yet to discover it. The document of January 5, 1966 contained not an option to purchase from but rather an option to sell on behalf of the applicant. The respondent had no option to purchase the property and this is where Mr Lakha appears to have erred when writing the letter of August 8, 1966, he erroneously claiming that such an option existed. What would have been the position if the applicant was invited to sell by a third party? Does the document of January 5, 1966 exclude the owner's right to sell independently of the auctioneer? Was the owner to wait indefinitely for a sale

until the time was opportune for the auctioneer to sell? Examining the document, my first reaction was that it was iniquitous and on reflection I have little reason to alter my first impression. The agreement contained no express prohibition against a sale by the applicant himself and if such a sale had been arranged the respondent could not have successfully claimed damages, assuming the sale had been negotiated independently of the respondents.

It is not necessary for me to consider other aspects of this case but it is clear that the respondent had no option to purchase the property, and while, with the power granted to it, the firm may have had authority to enter into an open contract of sale, it cannot be said on the facts disclosed that it had any interest which entitled the respondent to enter a caveat and this is the only question which I have to consider. It may well be that the respondent would have a lien on any monies paid in consequence of a sale of the property in certain circumstances, e.g. where the firm had introduced the purchaser to the vendor, but such lien could not be considered an interest in land which would give rise to a right to enter a caveat. In the circumstances this application must be allowed and it is ordered that the caveat be removed as prayed.

Order accordingly.

For the applicant:
NM Kassam
Kassam & Co, Dar-es-Salaam

For the respondent:
AA Lakha
Fraser Murray, Roden & Co, Dar-es-Salaam

Gokar Damji and Sons v Haji and others
[1969] 1 EA 311 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	3 June 1968
Case Number:	30/1967 (30/69)
Before:	Georges CJ
Sourced by:	LawAfrica

[1] Appeal – Order – For payment by instalments – Whether appeal lies from such order – Civil Procedure Code 1966, *O.* 20, *r.* 11, *O.* 40, *r.* 1, *and s.* 74 (*T.*).

[2] Civil Practice and Procedure – Order – For Payment by instalments – Whether appeal lies from order for – Civil Procedure Code 1966, *O.* 20, *r.* 11, *O.* 40, *r.* 1 *and s.* 74 (*T.*).

Editor's Summary

No appeal lies from an order made under Order 20, rule 11 of the Civil Procedure Code, 1966 for the payment of a decretal amount by instalments.

No cases referred to in judgment

Judgment

Georges CJ: This is an appeal from an order dated September 7, 1967, by the Senior Resident Magistrate, Mbeya, allowing the respondents to pay off a decretal sum of Shs. 20,225/- by instalments of Shs. 250/- per month from September 30, 1967. Interest was fixed at 6% per annum. The decree in the suit itself was dated May 4, 1967.

Mr N. P. Patel for the respondents argues that, since this order was made under O. 20, r. 11, of the Civil Procedure Code 1966, it is not appealable. His contention appears to be sound.

Section 74 of the Civil Procedure Code 1966 reads in part:

> "An appeal shall lie to the High Court from the following orders of the courts of Resident Magistrates and District Courts, and save as otherwise expressly provided in the body of the Code or by any law for the time being in force, from no other orders."

There follows a list of appealable orders, which does not include orders under O. 20, r. 11.

There is a general category in these terms:

> "(i) any order made under rules from which an appeal is expressly allowed by rules."

These are itemised in O. 40, r. 1, and do not include an order under O. 20, r. 11.

I have not been referred to any other "law for the time being in force" which makes the order appealable.

Mr Singh's counter to that argument was that the order was part of the original decree and was appealable as part of that decree. I find myself unable to accept that argument. It just does not conform with the facts.

The original decree was made on May 4, 1968. As pointed out by Mr N. P. Patel, a copy was ready on October 9, 1967, so that the time for appealing from that decree has passed and no appeal has been lodged. It is true that the fact of a decree having been passed for the Shs. 20,225/- is mentioned in the introductory part of the instalment order, but there is no reference to it in the substantive part. The memorandum of appeal states that the appellants are aggrieved by the "order made by the learned Senior Resident Magistrate on September 7, 1967". This cannot be said to be an appeal against the decree of May 4, 1967.

In the result, it is my view that this order is not appealable and that in the circumstances I need not enquire into the reasonableness of the instalment order or attempt to define the factors which should be taken into account in making such an order.

The appeal is accordingly dismissed with costs to the respondents.

Appeal dismissed.

For the appellant:
Ranbir Singh
Awtar Singh & Co, Dar-es-Salaam

For the respondent:
NP Patel
Natubhai Patel, Desai & Co, Dar-es-Salaam

Muhere v Republic
[1969] 1 EA 313 (HCT)

Division: High Court of Tanzania at Mwanza

Date of judgment: 18 June 1968

Case Number: 145/1968 (31/69)

Before: Mustafa J

Sourced by: LawAfrica

[1] Criminal Law – Stock theft – Possession of stock in a specified area – No evidence as to whether appellant found in possession – Substitution of charge of receiving stolen property not competent – Stock Theft Ordinance (*Cap.* 422), *s.* 3 (1) – *Penal Code* (*Cap.* 16), *s.* 311 (1) (*T.*).

[2] Criminal Practice and Procedure – Receiving stolen property – Offence substituted for charge of stock theft – Whether competent – Stock Theft Ordinance (*Cap.* 422), *s.* 3 (1) – *Penal Code* (*Cap.* 16), *s.* 311 (1) (*T.*).

[3] Evidence – Stock theft – Possession of stock in a specified area – No evidence as to where appellant found in possession – Stock Theft Ordinance (*Cap.* 422), *s.* 3 (1) – *Penal Code* (*Cap.* 16), *s.* 311 (1) (*T.*).

Editor's Summary

The appellant was convicted in the primary court of being found in a specified area in possession of stock in circumstances which might reasonably lead to the belief that the stock had been stolen. On appeal, the magistrate in the District Court set aside the conviction on the ground that there was no evidence to show that the appellant was found in possession of the stock in a specified area and substituted a conviction for receiving stolen property contrary to s. 311 (1) of the Penal Code. The present case was an appeal against the substituted conviction.

Held – Some of the particulars constituting an offence contrary to s. 3 (1) of the Stock Theft Ordinance are different from those constituting the offence of receiving stolen property contrary to s. 311 (1) of the Penal Code; and the substitution was irregular.

Appeal allowed, conviction quashed and sentence set aside.

No cases referred to in judgment

Judgment

Mustafa J: Appellant was charged in the primary court with an offence contrary to s. 3 (1) of the Stock Theft Ordinance (Cap. 422 of the Laws). He was convicted and sentenced to three years' imprisonment. He appealed to the district court which set aside the conviction under the Stock Theft Ordinance, but substituted a conviction for receiving stolen property contrary to s. 311 (1) of the Penal Code and reduced the sentence to two years' imprisonment. The appellant now appeals to this court.

In my view the District Magistrate was right to set aside the conviction against the appellant for an offence contrary to s. 3 (1) of the Stock Theft Ordinance. Sub-section (1) of s. 3 of Cap. 422 reads:

> "If any person is found in a specified area to be in possession of any stock in circumstances which may reasonably lead to the belief that such stock has been stolen such person shall, unless he gives an account which satisfies the court that the possession was lawful, be deemed to have stolen the same and shall be liable to any of the penalties prescribed for theft of stock."

The District Magistrate held there was no evidence as to where the appellant was found in possession of a sheep which complainant alleged was his property. Since there was no evidence that appellant was found within a "specified" area the District Magistrate correctly held that the appellant could not have been convicted for an offence contrary to s. 3 (1) of Cap. 422. On that ground he quashed the conviction.

However, the District Magistrate was wrong to substitute a conviction for receiving stolen property contrary to s. 311 (1) of the Penal Code in the circumstances. I do not know of any provision which allows such a substitution nor do I think this is a "minor offence" in terms of s. 181 of the Criminal Procedure Code. I think some of the particulars constituting an offence contrary to s. 3 (1) of the Stock Theft Ordinance are different from those constituting the offence of receiving stolen property contrary to s. 311 (1) of the Penal Code. I therefore allow the appellant's appeal, quash the conviction, set aside the sentence and order that he be released forthwith unless he is serving a sentence of imprisonment for another offence.

Order accordingly.

No appearance on either side.

Republic v International Trading and Credit Corporation of Tanganyika Ltd

[1969] 1 EA 314 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	5 April 1968
Case Number:	722/1966 (32/69)
Before:	Duff J
Sourced by:	LawAfrica

[1] Agency – Sale of goods – "Sale" – Whether there was a sale by the respondent of food unfit for human consumption – Respondent a mercantile agent acting on behalf of the owner of the goods.

[2] Food and drugs – Sale of – Whether there was a sale by the respondent – Food and Drugs Ordinance (*Cap.* 93), *ss.* 12 (1) (*a*) *and* 26 (*T.*).

[3] Sale of goods – "Sale" – By mercantile agent – Whether there was a sale by the respondent of food unfit for human consumption – Respondent a mercantile agent acting on behalf of the owner of the goods.

Editor's Summary

The respondent was charged with three counts of selling food unfit for human consumption contrary to s. 12 (1) (*a*) and s. 26 of the Food and Drugs Ordinance, and was acquitted by the magistrate in the court

below on the ground that there was no case to answer as there was no “sale” of food within the meaning of the section. The evidence showed that the respondent company had sold quantities of cassava to the three persons to whom the counts referred and had invoiced the purchasers accordingly. The cassava belonged to Kigoma Co-operative Union; but the purchasers dealt with the respondent company and the invoices bore the name of the respondent, with no reference to the Kigoma Co-operative Union. The magistrate found that the respondent company acted as marketing agents for the co-operative society in the sale of the cassava. The prosecution appealed against the magistrate’s decision in favour of the respondent.

Held – The contracts made between the respondent company and the purchasing

merchants disclosed a sale within the meaning of s. 12 (1) (*a*) of the Food and Drugs Ordinance;

Appeal allowed. Record remitted to the lower court for hearing.

Cases referred to in judgment:

(1) *Hotchin v. Hindmarsh*, [1891] 2 Q.B.D. 181.

(2) *Preston v. Albuery and Another*, [1963] 3 All E.R. 897.

(3) *Lester v. Balfour Williamson Merchant Shippers Ltd*., [1953] 2 Q.B.D. 168.

Judgment

Duff J: This is an appeal by the Director of Public Prosecutions by way of case stated against the decision of the Resident Magistrate, Dar-es-Salaam, acquitting the respondent company on three counts, he ruling that there was no case to answer.

Three counts were preferred against the respondent company, and it will be convenient to specify these counts, which are as follows:

> "COUNT ONE:
>
> *Statement of offence* (*with section and law*):
>
> Sale of food unfit for human consumption, contrary to sections 12 (1) and 26 of the Food and Drugs Ordinance, Cap. 93, Revised Laws.
>
> *Particulars of Offence*:
>
> Messrs. International Trading and Credit Company of Tanganyika Limited, on or about March 30, 1966, did sell to Jeraj Produce Shop of Dar-es-Salaam, 200 bags of dried cassava, intended for, but unfit for, human consumption.
>
> *COUNT TWO*:
>
> *Statement of offence* (*with section and law*):
>
> As Count One.
>
> *Particulars of offence*:
>
> Messrs. International Trading and Credit Company of Tanganyika Limited on or about March 30, 1966, did sell to one N. G. Kassam of Dar-es-Salaam 99 bags of dried cassava, intended for, but unfit for, human consumption.
>
> *COUNT THREE*:
>
> *Statement of offence* (*with section and law*):
>
> As Count One.
>
> *Particulars of offence*:
>
> Messrs. International Trading and Credit Company of Tanganyika Limited on or about March 30, 1966, did sell to Karim Store of Dar-es-Salaam, 184 bags of dried cassava, intended for, but unfit for, human consumption."

The facts adduced by the prosecution are simple enough and the sole question which has to be considered is whether the evidence in the case constitutes a selling and falls within the provisions of s. 12 (1) (*a*) of

the Food and Drugs Ordinance (Cap. 93). Criticism has been levelled against the form of the case stated but it is clear and accepted that the question of law to be determined by this court is confined to one factor only, viz. whether there was a sale. As I understand the arguments put forward on behalf of the Republic, this court should hold that there was a sale and, if so, this being one of the ingredients of the offence charged, the case should be remitted to the lower court with a direction that the hearing of the case should be continued.

When this case was argued before one of my learned brothers it was considered

that additional evidence should be produced in accordance with the provisions of s. 322 of the Criminal Procedure Code and this course was agreed upon by both parties. In consequence of my learned brother's direction the export manager of the respondent company, Mr Lubbe, was called as a prosecution witness and he admitted that his company had sold quantities of cassava to the three persons to whom the various counts refer, invoices being later sent by the company and these persons choosing to ignore them. Mr Lubbe further said that the cassava belonged to the Kigoma Co-operative Union, a co-operative society based in Tanzania, his company collecting monies for sales on behalf of the union and deducting therefrom a small commission, they being marketing agents. The three merchants referred to had earlier given evidence in support of the prosecution case, and without going into their testimonies there was not the slightest evidence to dispute the fact that they purchased the cassava from the respondent company. It did emerge from what they said that the cassava belonged to the Kigoma Co-operative Union but their statements that they purchased from the respondent company were not shaken in any way. The invoices which were produced by Mr Lubbe show that quantities of cassava railed from Kigoma were sold to the merchants concerned, the invoices being headed "International Trading and Credit Co. of Tanganyika Ltd., P.O. Box 9172, Dar-es-Salaam". The invoices specified the quantities involved and the prices thereof but no reference whatsoever is made to the co-operative union to whom the cassava was said to belong.

The original case stated by the magistrate was not considered satisfactory and an amended one was subsequently filed by direction. From the amended case stated it appears that the magistrate found that the respondent company acted as marketing agents for the co-operative company for the sale of cassava and that the named merchants entered into transactions for the delivery of a number of bags of cassava which were collected from the goods shed at Ilala, Dar-es-Salaam, invoices for the produce being sent by the respondent company to the merchants. It was also accepted that the company was paid on a commission basis for their services. It is not easy to determine what was in the mind of the magistrate from the case stated by him, but he appears to be at pains to distinguish between the merchants entering into transactions with the company for the delivery of cassava and the sale of cassava by the company to these traders. In his judgment, however, the magistrate accepted and found that the company was an agent for the co-operative society in the sale of cassava.

Counsel for the respondents carefully argued that his clients could not be considered sellers of the goods, and referred me to a number of cases; counsel for the Republic also relying on most of these cases. One point made by the magistrate in his cases stated which I would briefly refer to is whether it would have been more proper to prosecute the co-operative union, the owners of the goods, for the alleged offences. I do not think that is the function of the court to decide who should be prosecuted, and with respect I agree with counsel for the Republic that is a matter for the Director of Public Prosecutions to decide who should be prosecuted, the court's function being to decide whether or not the particular persons charged are guilty of the offences charged.

The leading case on the subject of what constitutes a seller appears to be *Hotchin v. Hindmarsh*, [1891] 2 Q.B. 181. In that case an employee of a dairy company sold adulterated milk to a customer and it was held that a person who takes an article in his hand and performs the physical act of transferring the adulterated thing to the purchaser is a seller. The intention of the legislature was interpreted to mean that the person who does the physical act is the seller, and this could be either the principal or the agent. Mr Lakha (for the respondent company) very fairly pointed out that in *Preston v. Albuery and Another*, [1963]

3 All E.R. 897 the principle was extended to cover a situation whereby a person who passes the property in the goods is considered a seller. Lord Parker at page 900 said:

> "For my part, I am satisfied that a person who converts, if I may so put it, an agreement to sell into a sale by passing the property in the goods, whether by appropriation or in some other way is a person who sells."

Mr Lakha further argued that despite the extension of the principle enunciated in the Hotchin case a finding that there was a sale by the company would not be warranted because there was no evidence that the respondent company had appropriated any part of the goods which came by rail to the various merchants. In *Lester v. Balfour Williamson Merchant Shippers Ltd*., [1953] 2 Q.B. 168 it was held that company were selling as brokers on behalf of a principal, the contract stating "for account of our principals", and were therefore not themselves the sellers. Lord Goddard, C.J. in that case (at page 177) said:

> "If they (the brokers) had been the sellers, even though they had never handled the goods, they would have been liable."

This statement would appear to be in keeping with what Lord Parker said in the *Albuery* case.

It is to be noted that in the invoices produced no reference whatsoever is made to the Kigoma Co-operative Union and from this it would appear that it could not be suggested that the company showed an intention to make the co-operative union principals and themselves brokers. I do not consider it necessary to enter into further discussion of the points put forward by both sides, because to me it is abundantly clear, despite the terminology used by the magistrate, that the contracts made were between the merchants and the respondent company, no reference whatsoever being made to the co-operative union, and these contracts disclose a sale within the meaning of s. 12 (1) (*a*) of the Food and Drugs Ordinance. Having decided therefore that there was *prima facie* evidence of a sale I direct that the record be remitted to the lower court, the magistrate to continue with the hearing of the case according to law.

Order accordingly.

For the Republic:
DZ Lubava (State Attorney, Tanzania)

For the respondent:
AA Lakha
Fraser Murray, Roden & Co, Dar-es-Salaam

For the appellant:
Attorney-General, Tanzania

Karisa and another v Solanki and another

[1969] 1 EA 318 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 23 January 1969

Case Number:	31/1968 (34/69)
Before:	Sir Charles Newbold P, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Rudd, J

[1] Appeal – Negligence – Principles on which appeal court will interfere with findings of trial judge of negligence or no negligence.

[2] Negligence – Collision – Speed – Limits of vision – Driving at night at a speed at which driver cannot stop within range of vision – Whether negligent.

[3] Negligence – Collision – Unlit lorry on road at night – Degree of responsibility – Vicarious liability – Owner of car – Owner of vehicle presumed responsible for the driver.

[4] Vicarious liability – Loan of car – Whether evidence of lending displaces presumption that owner responsible for driver.

Editor's Summary

The second respondent was the owner of a car which was being driven by his brother the first respondent on the Mombasa road at night when it was in collision with an unlighted stationary lorry owned and driven by the appellants. At about the time of the collision a bus had been travelling in the opposite direction to the car. On the hearing of the suit by the plaintiff, who was a passenger in the car, the judge found the lorry solely to blame for the accident. The appellants appealed.

Held –

(i) a finding by a trial judge on whether or not negligence exists is not subject to the principle set out in *Shariff v. Sethna,* [1963] E.A. 239 at p. 249 that the finding of a trial judge on degrees of blame will not be interfered with save in exceptional circumstances;

(ii) it is not necessarily negligent to drive at night at a speed which does not permit the driver to stop within the range of his vision (*Panesar v. Lochab*, [1966] E.A. 401 at p. 404 approved);

(iii) the combination of the speed at which the car was travelling taken together with the lookout kept by the driver meant he was negligent in not seeing the lorry in time to take avoiding action;

(iv) the main cause of the accident was the parking of the unlit lorry on the road at a busy time and the negligence of the car driver would therefore be assessed at 20%;

(v) the presumption that a car is being driven by a person for whose negligence the owner is responsible is not necessarily disturbed by evidence that the car was lent to the driver by the owner as this does not dispel the possibility that it was being driven for their joint benefit;

(vii) the proved circumstances raised an inference that the driver was driving the car for the joint benefit of the owner and himself and in the absence of evidence to the contrary the owner was responsible for the negligence of the driver.

Appeal allowed.

Cases referred to in judgment:

(1) *Barnard v. Sully* (1931), 47 T.L.R. 557.

(2) *Shariff v. Sethna*, [1963] E.A. 239.

(3) *Panesar v. Lochab*, [1966] E.A. 401.

(4) *Selle v. Associated Motor Boat Co. Ltd*., [1968] E.A. 123.

January 23, 1969. The following considered judgments were read:

Judgment

Sir Charles Newbold P: On December 24, 1965 Mr M. N. Parmar was travelling from Nairobi to Mombasa in a car driven by the first respondent (the car driver) and owned by the second respondent (the car owner), who was a brother of the car driver. At about 9.0 p.m. that night the car was involved in an accident with a lorry and Mr Parmar was injured. He sued the two respondents, the first appellant (the lorry driver) and second appellant (the lorry owner) claiming that both the car driver and the lorry driver were negligent and that the car owner and the lorry owner were vicariously liable. The lorry driver and the lorry owner in their defence denied any negligence and in the alternative claimed that the accident was also caused by the negligence of the car driver and sought contribution from the car driver and the car owner for such negligence. The car driver and the car owner similarly denied any negligence and in the alternative sought contribution from the lorry driver and the lorry owner for the negligence of the lorry driver. The trial judge held that the accident was caused wholly by the negligence of the lorry driver and awarded damages to Mr Parmar against both the lorry driver and the lorry owner and dismissed the claim against the car driver and the car owner. Mr Parmar, having recovered judgment, is no longer interested in these proceedings, which consist solely of an appeal by the lorry driver and the lorry owner claiming that the judge was wrong in holding that the accident was caused solely by the negligence of the lorry driver. The appellants, while accepting liability for some negligence, claim that the car driver was also negligent; and they claim a contribution to the amount of damages they have to pay against him and the car owner on the ground of such negligence and on the basis that the car owner is responsible for the negligence of the car driver.

There is really little dispute about the facts, which may briefly be set out as follows. The plaintiff was one of six persons in the car, and among the passengers was the infant child of the car owner, who was himself proceeding to Mombasa at the same time in another car. The accident happened at about 9.0 p.m. on a dark night on a straight stretch of road which was sloping slightly uphill in the direction of Mombasa. The car had come round a right-hand bend and the road was then straight for about 300 yards, being level for about 475 ft. and then sloping upwards for about 545 ft. to where the lorry was parked. From the lorry the road continued to slope slightly upwards for about 365 ft. and then it came to the brow of the hill when there was a left-hand turn going towards Mombasa. The road at the spot where the lorry was parked was about 21 ft. of tarmac and the lorry was parked on the edge of the tarmac and occupied almost 7 ft. of it. The lorry had no lights and was heavily loaded with charcoal bags. The colour of the lorry and its load was dark and it could not easily be seen at night. To the left of the lorry there was a grass verge on which the lorry could have been parked and on which the car could have travelled. The car rounded the right-hand bend at a speed of about 65 m.p.h. and shortly after it did so a bus appeared from the direction of Mombasa. The car driver slowed down slightly to about 60 m.p.h. and dipped his lights. The driver of the bus also dipped his lights. The car driver continued at about 60 m.p.h. although as he said he was slightly dazzled, though not blinded by the bus’s lights. At some stage shortly before the accident the car driver saw for the first time a black object, which was the lorry, in the road; and at about

the same time the plaintiff

appreciated that there was an obstruction in the road and shouted a warning. The car driver at first tried to pass the lorry on the right-hand side but decided that was too dangerous in view of the oncoming bus and swung back to his left, braking hard and crashing directly into the back of the lorry. The car was extensively damaged and some persons in it killed and the plaintiff injured. At about the time of the collision the bus passed the parked lorry.

The trial judge held that the negligence of the lorry driver in parking his lorry on this road without any lights was solely responsible for the accident. He held that the car driver was not negligent as he was not driving at an excessive speed, nor had he failed to keep a proper look out, nor had he failed to do anything which he should reasonably have done in the circumstances. It is from this decision that the appellants have appealed.

Three points arise on this appeal. The first is the circumstances in which this court should interfere with a finding of a trial judge that one of two drivers was solely responsible by his negligence for an accident; the second is whether the car driver was guilty of any negligence which contributed to the accident and, if so, the amount of such negligence; and the third is whether the car owner is vicariously responsible for any negligence of the car driver.

Dealing with the first of those points, it has been accepted that this court will not normally interfere with the finding of a trial judge attributing degrees of blame to two or more tortfeasors. As Sir Ronald Sinclair, P. said in *Shariff v. Sethna*, [1963] E.A. 239 at p. 249:

> "The finding of a trial judge as to degrees of blame to be attributed to two or more tortfeasors involves an individual choice or discretion and will not be interfered with on appeal save in exceptional circumstances: see *British Fame* (*Owners*) *v. MacGregor* (*Owners*), [1943] 1 All E.R. 33."

Mr. Mackie-Robertson, who appeared for the respondents, submitted that the same principle applied where the finding of the trial judge was that no negligence existed. I am afraid that I do not agree. I accept that a finding of negligence or no negligence is largely a question of fact and very often a question of degree; but it seems to me that there is a distinction, though in a number of cases it may well be a fine distinction, between a finding that no negligence existed and a finding as to the extent to which accepted negligence contributed to an accident. Where a trial judge finds that one of the parties to an accident has not been guilty of any negligence which contributed to the accident, this court should not, even if it is doubtful that it would have arrived at the same decision had it been sitting at first instance, interfere with that finding, which, as I have said, is largely a question of fact and of degree, unless it is satisfied that the trial judge was wrong. But if it is so satisfied, then it is under a duty to interfere with the decision, and such interference is not in any way restricted to exceptional cases.

Dealing with the second point, I have no doubt that, had I been sitting as a trial judge, I should have found some degree of negligence on the part of the car driver. That, however, is not of itself sufficient to enable me to reverse his decision – as I have said, I must be satisfied that he was wrong. The negligence which is alleged against the car driver in this case is based on the two factors of speed and failing to keep a proper look-out. The trial judge seems to have considered these factors as two distinct and not inter-related matters. On the first, that is whether a speed of 60 m.p.h. was in itself so excessive as to be negligent, the judge came to the conclusion that it was not in itself negligence. I agree with him. As he stated, the Mombasa road is a fast road and speeds of 60 m.p.h., or even appreciably more, at night time are not in my view negligent per se. There used to be an old theory that a speed which did not permit the driver to stop within the range of his vision was ipso facto a negligent speed.

This theory is now exploded. I agree entirely with the statement of Trevelyan, J. in *Panesar v. Lochab*, [1966] E.A. 401 at p. 405 that:

> "There is no rule of law that when you drive at night you must be able to pull up well within the limits of your lights. It is a question of fact in each case: *Morris v. Luton*."

Mr Wilkinson, who appeared for the appellants, accepted such was the law, though he seemed to suggest that there were very few circumstances in which a driver would not be negligent if he could not pull up within the range of the vision provided by his lights. If he did so I do not agree. I have no doubt that it is entirely a question of fact having regard to the circumstances in each case. It is well-known that the Mombasa road is, for large parts of it, a very fast road. Normally there is relatively little traffic on it and there are relatively few places where traffic or people will emerge suddenly on to the road from the side. In these circumstances a speed in excess of that which would enable a driver to pull up within the range of his vision is not, in my view, of itself negligence. Even if a driver was not able to stop within the range of his vision, the very wide verges on each side of the tarmac for most of the road would enable a driver to take evasive action which would avoid an accident should he be unable to stop before the potential cause of the accident. But the position may be different if additional circumstances are imposed upon the normal conditions. One of the most important of these additional circumstances is where the lights of an oncoming vehicle impair, to a greater or lesser extent, the vision of a driver with, at the same time, the area available to the driver to take evasive action being very considerably reduced by the presence on the road of the oncoming vehicle. That is precisely what happened in this case. The car driver, driving at a speed of about 65 m.p.h. which was not in itself negligent, when he saw the oncoming bus, whose presence on the road reduced the area available to take evasive action should any emergency occur and whose lights to some extent impaired the area of vision provided by his own lights, only reduced his speed to about 60 m.p.h. This action was one which a reasonably careful driver, and the duty which the car driver owed to the plaintiff was that of being a reasonably careful driver, would not have taken, as the speed in those circumstances enormously increased the potential danger of an accident. While, therefore, a speed of 60 m.p.h. is not negligence, it is that speed in the particular circumstances which constitutes negligence; and in my view the judge was wrong in considering the question of speed separate from the other circumstances of the case.

As far as keeping a proper look-out was concerned, the judge considered that having regard to the sombre colour of the lorry, the fact that it was unlighted and the fact that the car was travelling with dipped lights owing to the presence of the bus, the car driver could not be said not to be keeping a proper look-out. I regret I am unable to agree. As the car driver chose to proceed at a speed of 60 m.p.h. in the particular circumstances, then his look-out should have been all the more acute and keen and he should have been ready to take evasive action during the period that his vision was further limited by the existence of the bus on the road. I agree with the judge that the car driver was correct in not seeking to pass the lorry on the right-hand side. There was a very real possibility of coming into very violent collision with the bus, a collision which, as the combined speed of the vehicles would have been double that of the car at the moment of impact with the stationary lorry, might well have caused much more damage and many more deaths. But I am not satisfied that the car driver could not and should not as a reasonably careful driver, keeping a particularly keen look-out, have seen the lorry in time to have swung to the left on to the verge, no matter how uncertain his knowledge of the precise terrain there, rather than run straight into the stationary lorry.

Looking at the facts of the case as a whole, I consider that the judge tended to consider the two main circumstances of speed and a proper look-out separately and not as part of a comprehensive whole, and that it was this failure to look at the facts as a whole which led him into the manifest error of coming to the conclusion that there was no negligence on the part of the car driver. I consider, therefore, that this is a case in which it would be proper for me, sitting on appeal, to say, not merely that had I have been sitting at first instance I would have found negligence, but that the trial judge was clearly wrong in failing to find negligence on the part of the car driver.

Having arrived at the conclusion that the accident was contributed to by the negligence of the car driver, the very difficult question then arises as to the extent of such contribution. There can be no doubt whatsoever that the main cause of the accident was the parking of a large unlit lorry, occupying about a third of the road, on the main road between Mombasa and Nairobi on the night before Christmas when there was every likelihood of a considerable amount of traffic traveling at a fast speed along this road. Having arrived at that conclusion clearly the vast majority of the blame must be attributed to the lorry. The precise amount to which the negligence of the car driver contributed to the accident I find difficult to assess, but giving it the best consideration that I can, I have come to the conclusion that it contributed to the accident to the extent of 20 per cent.

The third point is whether the car owner is responsible for the negligence of the car driver. The law on this matter is concisely and clearly set out in the judgment of Sir Clement De Lestang, V P in Selle v Associated Motor Boat Co Limited [1968] EA 123 at page 128, where he said:

> "Where, however, a person delegates a task or duty to another, not a servant, or employs another, not a servant, to do something for his benefit or the joint benefit of himself and the other, whether the other person be called agent or independent contractor, the employer will be liable for the negligence of that other in the performance of the task, duty or act as the case may be."

Mr Mackie-Robertson has submitted that as the car had been lent by the owner to the driver, there was no evidence that the car driver was the servant or agent of the car owner in circumstances making the car owner liable for the negligence of the car driver. Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (see Barnard v Sully (1931) 47 TLR 557). This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by evidence that the car was lent to the driver by the owner, as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver. In this case the evidence is that the owner and driver were brothers and the driver said he had been lent the car by the owner, but he did not state the particular circumstances in which he borrowed the car. The surrounding circumstances are that the son of the owner was traveling in the car, that there were other close relatives of the owner and the driver in the car, that the car was going to Mombasa immediately before Christmas at a time when family groups go there on holiday, and that the owner was himself, on the same day, proceeding to Mombasa in another car. These circumstances, to my mind, give rise to an inference that the owner, the driver and members of the family were proceeding together on holiday to the coast and that the driver was driving the car for the joint benefit of the owner and himself in circumstances in which the car for the joint benefit of the owner and himself in circumstances in which the owner should be held responsible for the acts of the driver. The inference could, of course, be rebutted

by credible evidence to the contrary, but at no stage was any evidence given as to the circumstances in which the car was lent to the driver. Thus the presumption to which I have already referred that the owner of a car is liable for the negligence of the driver has not been rebutted. Unfortunately the trial judge never considered this aspect of the matter and we have not had the benefit of his finding on the point. In the absence, however, of any finding on his part as to the relationship of the owner and the driver, in my view the circumstances here are such that the owner should be held responsible for the negligence of the driver.

For these reasons I would allow the appeal and set aside that part of the judgment and the decree which provides that the negligence of the lorry driver was the sole cause of the accident, that the full amount of the damages should be paid by only the lorry driver and the lorry owner and that the suit against the car driver and the car owner be dismissed and substitute therefore a judgment and decree giving judgment for the plaintiff for the amount awarded together with interest as set out in the decree jointly and severally against the lorry driver, the lorry owner, the car driver and the car owner, and directing that as between themselves the negligence of the lorry driver contributed as to 80 per cent to the accident and that of the car driver as to 20 per cent, with a consequent right of contribution. I would also set aside that part of the decree which provided that the suit against the car driver and the car owner be dismissed with costs and that the plaintiff could recover from the lorry driver and the lorry owner the costs which he had been liable to pay to the car driver and the car owner and substitute therefore an order that the plaintiff recover the costs of the suit on the higher scale from the defendants to the suit. I would also give to the parties liberty to apply within seven days with regard to a contribution order in relation to such costs. As regards the cost of the appeal, I would order the first and second respondents to pay the costs of the first and second appellants with, a certificate for two advocates. As the other members of the court agree it is so ordered.

Duffus JA: I agree.

Spry JA: I agree.

Appeal allowed.

For the appellants:
PJ Wilkinson, QC and *Ram Hira*
Ram Hira, Mombasa

For the respondents:
JA Mackie-Robertson QC and *Zool Nimji*
Shapley Barret Marsh & Co, Nairobi

West Nile District Administration v Dritoo
[1969] 1 EA 324 (CAEA)

Division: Court of Appeal for East Africa at Kampala

Date of judgment: 14 January 1969

Case Number:	35/1968 (35/69)
Before:	Duffus, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda – Fuad, J

[1] Police – Arrest without warrant – By Local Administration police – Whether Administration liable – Relationship with Government – Whether Administration policeman is servant of Administration or of Government – Constitution of Uganda 1966, *arts*. 81, 89 *and* 110 – *Local Administrations Act* (*Cap*. 25), *ss.* 2, 3 (2), 22 *and* 23 – *Police Act* (*Cap*. 312), *ss.* 2, 3 (5), 3 (6), 4, 870, 879 – *Criminal Procedure Code, s.* 23 (*U*.).

[2] Police – Vicarious liability for acts of – Whether Local Administration police are servants of Administration or of Uganda Government.

[3] Vicarious liability – Police – Local Administration police – Whether Administration or Uganda Government liable for torts of.

Editor's Summary

The Chief of Police serving the West Nile District Administration (the appellant) unlawfully arrested and falsely imprisoned the respondent between July 6 and August 24, 1966. In the Uganda High Court the respondent was awarded damages (see [1968] E.A. 428). On appeal the main issue for consideration was whether the appellant Administration was vicariously liable for the torts of the Chief of Police. The legislative provisions in force at the time of the unlawful arrest and false imprisonment of the respondent are referred to in the judgment of Duffus, J.A.

Held – (by Duffus and Law, JJ.A.; Spry, J.A. dissenting) the Chief of Police was an agent of the Administration and the Administration was responsible for the acts of the Chief of Police.

Appeal dismissed.

Cases referred to in judgment:

(1) *Stanbury v. Exeter Corporation*, [1905] 2 K.B. 838.

(2) *Fisher v. Oldham Corporation*, [1930] 2 K.B. 364.

(3) *Attorney-General for New South Wales v. Perpetual Trustee Co. Ltd. and Others*, [1955] A.C. 457; 1 All E.R. 846.

(4) *Percy* (*Pauper*) *v. Corporation of City of Glasgow*, [1922] 2 A.C. 299.

(5) *Lloyd v. Grace, Smith & Co*., [1912] A.C. 716.

(6) *Enever v. The King*, [1906] C.L.R. 969.

January 14, 1969. The following considered judgments were read:

Judgment

Duffus JA: The respondent, Erasto Dritoo, recovered Shs. 14,000/- damages against the appellant, the West Nile District Administration, for false imprisonment. The trial judge found that the respondent had been unlawfully arrested and imprisoned by the appellant Administration's Chief of Police, Mr Adam Angila, who was at all material times the servant of the defendant administration acting within the scope of his employment.

The appellant Administration appeals against the judgment on two grounds:

"1. The learned judge erred in law in holding that the appellant was liable in respect of torts committed by its Chief of Police independently and whilst performing his own statutory duties.

2. The learned trial judge erred in assessing the damages for 49 days' imprisonment of the respondent without first considering and making a finding upon the evidence of transfer of the respondents' case to Central Government Police after nine days' detention by the appellant's Chief of Police."

The first ground of appeal concerns the liability of the Local Administration for the torts committed by members of its own Administration police force. There have been of late a considerable number of amendments to the Constitution of Uganda and in the various Acts which relate to this matter. The false imprisonment, the subject of this action, occurred between July 6 and August 24, 1966, and I will refer to the various enactments which were admittedly in force during that period. It has not been suggested that any subsequent legislation affects liability in this case, if liability exists.

Section 89 of the 1966 Constitution provides for the appointment of councils for each district and s. 3 of the Local Administrations Act (Cap. 25), before its re-enactment in 1967, provided for the establishment of a Local Administration, and sub-s. (2) provided:

"(2) Every administration shall be a body corporate having perpetual succession and a common seal and may sue and be sued in its corporate name."

The functions of an Administration and the establishment of a police force are dealt with under Part IV of the Act and ss. 22 and 23 state *inter alia*:

"22. (1) It shall be the duty of every administration to discharge the functions conferred upon it by the provisions of this or any other Act and generally to assist in the maintenance of order and good government within the area of its authority; and for these purposes, an administration may, within the limits of the functions so conferred, either by its own officers or by duly appointed agents do all such things as are necessary or desirable for the discharge of such functions.

23. (1) It shall be the duty of every administration in co-operation with the Government to the best of its ability to assist in preventing the commission of any offence, to assist in the arrest of any offenders and to assist in the restoration of any property unlawfully obtained.

(2) In order to carry out its duties under subsection (1) of this section an administration may, subject to the provisions of the Police Act, establish a police force which shall have such powers, duties and responsibilities as shall be conferred upon it from time to time by any Act."

The importance of s. 22 is that the law imposes on all Local Administrations, such as the appellant in this case, the duty of assisting in the maintenance of order and good government, and power is given for the Administration to act either by its own officers or by duly appointed agents, whilst s. 23 goes on specifically to impose the duty on Local Administrations "of assisting in preventing the commission of any offence" and in the arrest of any offender etc. and sub-s. (2) gives the Local Administration authority to establish a police force for the purpose of carrying out these duties. Subsection (2) does refer to the force being established subject to the Police Act (Cap. 312) and states that it shall have such powers, duties and responsibility as may be conferred

upon it by any Act but the basic purpose of the establishment of a Local Administration police force is to carry out the duties imposed on the Local Administration of assisting in the prevention of crime and in the arrest of offenders and the restoration of property unlawfully obtained.

The establishment of an Administration police force is also provided for by ss. 3 (5) and (6) of the Police Act (Cap. 312) which states:

> "(5) Every administration shall, so soon as the Minister after consultation with the Inspector General is satisfied that it is expedient to do so, establish within the area of its authority an administration police force to be known by the name of the administration.
>
> (6) An administration police force shall, subject to the provisions of this Act, operate in the area within the authority of the administration, and its constitution, powers and duties shall be regulated in accordance with the provisions of this Act."

Part XI B deals generally with the constitution, powers and duties of an Administration police force. Section 87D states that police officers of an Administration police force shall have the same powers, duties and responsibilities as those conferred or imposed under the provisions of the Act on police officers generally, and under s. 4 of the Act "every police force shall be employed in Uganda for the prevention and detection of crime, apprehension of offenders, the preservation of law and order, the protection of property and due enforcement of all laws and regulations with which they are directly charged".

The main contention advanced by Mr Clerk, the appellant's advocate, is to the effect that the relationship of master and servant does not exist between a Local Administration and its police force and he submitted that the local commander, Angila, when he arrested and detained the respondent, acted independently and in exercise of the statutory powers conferred on him, in this particular instance by s. 23 of the Criminal Procedure Code. Mr Clerk relied on the authority on a number of English cases and in particular he referred to the judgments in *Stanbury v. Exeter Corporation*, [1905] 2 K.B. 838 and *Fisher v. Oldham Corporation*, [1930] 2 K.B. 364 and also to the decision of the Judicial Committee in the Australian case of *Attorney-General for New South Wales v. Perpetual Trustee Co. Ltd*., [1955] A.C. 457. This latter case was an action by the Crown claiming damages for the loss of services of a policeman who was injured due to an alleged act of negligent driving, and the following extract from the judgment of the court delivered by Viscount Simonds basically sets out the principles relied on by the appellant:

> "Their Lordships can now express their final opinion upon the case. They repeat that in their view there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he is said to serve. The constable falls within the latter category. His authority is original, not delegated, and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract The essential difference is recognized in the fact that his relationship to the Government is not in ordinary parlance described as that of servant and master."

The legal question raised by the appellant in this case has apparently never been taken or considered in the Uganda courts before and as the learned trial judge stated and as both the advocates before us agreed, responsibility for the torts of a policeman had previously been accepted either by the Central Government or by the Local Administration dependent upon whether the policeman was a member of the Central police force or of an Administration police force.

The learned judge gave this matter very full and careful consideration and he also invited the Attorney-General to appear before him in the role of amicus curiae and as a result the Solicitor-General appeared and addressed the court. In his judgment the learned judge (Fuad, J.), after full consideration of the various factors, referred to the following passage from Salmond on Torts, 14th Edn. at page 647 which dealt with the authorities cited by Mr Clerk to which I have already referred:

> "(2) There is authority for saying that if the tort in question is solely the breach of a duty imposed directly upon the servant himself either by common law or statute the master is not vicariously liable for it; he will be liable, it is said, only if he has committed (as he may have) a breach of some duty laid upon him personally, or has intervened in the matter with express orders to the servant. These cases seem to have introduced an unnecessary subtlety and refinement into the law. They seem to be based upon the obsolete and misleading notion that vicarious liability depends upon the existence of the master's power to control the way in which the work is done; the true theory, however, is that the relationship of master and servant of itself gives rise to the liability, and that the right of control is only one factor in determining whether the relationship exists."

The learned judge then went on to say:

> "It seems to me, with respect, that Salmond places the authorities in the right perspective. Accepting as I do that it is the relationship of master and servant which gives rise to vicarious liability, I have to consider whether the law of Uganda creates that relationship between Mr Angila and the Administration. I am of the opinion that the provisions of s. 3 (5) and (6) of the Police Act when read with those of s. 23 of the Local Administrations Act have that effect. A Local Administration must establish a police force 'to be known by the name of the Administration'. Section 23 of the Local Administrations Act puts the matter in another way – the administration is charged with the duty of establishing a police force so that it may carry out its function of assisting the State in the preservation of law and order. It is to be noticed that nowhere in *Fisher's* case are provisions of an analogous nature cited or relied upon. Mr Angila, under section 87G of the Police Act, was the 'Local Commander' of the Administration police force. Not without some difficulty, then, I have reached the conclusion that Mr Angila was at all material times the servant of the defendant Administration acting within the scope of his employment, and liability is established."

In his submission to us Mr Clerk referred to the test set out in Beven on Negligence, 4th Edn., Vol. I at page 416 which postulates four questions which should be answered in the affirmative to establish the relationship of master and servant. These questions are:

> "(1) Between whom is the contract of employment for service made?
>
> (2) By whom is payment of wages made?
>
> (3) Who has the power to discharge?
>
> (4) And most important of all, whose orders is the employed bound to obey?"

Mr Clerk submitted that out of all these four tests the only one that applied to the appellant Administration in this case was that it paid the policeman wages.

It is a fact that the power to appoint and dismiss police officers is by s. 110 of the 1966 Constitution vested generally on the President of Uganda acting

on the advice of the Public Service Commission and that Part XI B of the Police Act also contains provisions vesting powers of appointment and discipline of Administration police forces in persons other than the Local Administration. It is also a fact that s. 81 of the 1966 Constitution and various sections of the Police Act give the Inspector-General wide powers of supervision and control over an Administration police force and that it does appear that the Local Administration, the appellant in this case, has very little control over individual members of the force. Local Administrations are by virtue of s. 2 of the Police Act the police authority in respect of its force but this appointment in fact gives a Local Administration, except for the right to allow other employment under s. 25, no real power of control.

It is also a fact that as stated in the *New South Wales* case a policeman exercises his powers and duties as a policeman independently, and in his own discretion, by virtue of his office. In this case as the learned judge pointed out the Local Commander must have exercised his right of arrest by virtue of s. 23 of the Criminal Procedure Code, even though, if one is to judge from his confused evidence at the trial, it would be a question of considerable doubt whether the Local Commander had in fact any idea why or by what authority he was arresting the respondent.

The English cases and the decision of the Judicial Committee in the case from Australia to which I have referred are of course based on the law in those countries. English common law and the doctrines of equity as in force in England on August 11, 1902 apply in Uganda in the restricted sense specified in the Judicature Act (Cap. 34), but subject to the written laws of Uganda. The learned judge was in my view right in considering the law to be applied here with particular reference to the statute law of Uganda. It is clear that the Local Administration and the members of their police force have not the usual and accepted master and servant relationship but it is also apparent on referring to the law under which an Administration police force is established that this force is expressly established by the Local Administration for the purpose of carrying out or assisting the Local Administration to carry out its duties as defined by s. 23 (1) of the Local Administrations Act (Cap. 25), that is to say:

> ". . . in preventing the commission of any offence, to assist in the arrest of any offenders and to assist in the restoration of any property unlawfully obtained."

Sub-sections (5) and (6) of s. 3 of the Police Act also enact that it is an Administration that establishes its own Administration police force which, subject to the provisions of that Act, only operates in the area within the authority of the Administration.

There is a special statutory relationship between a Local Administration and its police force. An Administration police force is in fact established for the purpose of assisting the Local Administration to carry out its statutory functions within the area of its authority, and in carrying out such duties the members of such force are acting on behalf of the Local Administration. In my view the responsibility of a Local Administration for the torts of a member of its police force is that of a principal for the acts of his agent. I would in this respect refer to the following passage of Viscount Haldane in the decision of the House of Lords in the case of *Percy* (*Pauper*) *v. Corporation of City of Glasgow*, [1922] 2 A.C. 299 at p. 306 which with respect I consider correctly sets out the law to be applied to this case:

> "As was laid down by Story in a passage adopted in an earlier case by Blackburn, J. and approved in this House in *Lloyd v. Grace, Smith & Co*., [1912] A.C. 716, 'the principal is liable to third persons in a civil suit' for

> the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent *in the course of his employment*, although the principal did not authorise, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them. The limitation is that 'the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorised them to be done, or he has subsequently adopted them for his own use and benefit'."

The test is: did the acts of the Local Commander in this case occur "in the course of his employment" or as the learned trial judge said "within the scope of his employment"? The learned judge came to the conclusion that the Local Commander was a servant of the appellant Administration, and although, as I have said, he was not, in my opinion, a servant in the accepted sense, he was undoubtedly an agent acting on its behalf in accordance with the requirements of s. 23 of the Local Administration Act and this has the effect in this case of making the appellant Administration equally responsible for his acts. On the evidence and findings of the trial judge it is clear that the Local Commander was acting in the course of his employment. In my view the learned judge came to a correct decision in this matter.

With respect I can find no merit in the second ground of the appeal. The imprisonment was from the evidence a continuous act and followed as a result of the unlawful arrest. There is no evidence to show that any portion of the imprisonment was the result of an intervening act by another party. I would therefore dismiss this appeal with costs. As Law, J.A. agrees it is ordered accordingly.

Law JA: The facts have been sufficiently stated in the judgments of Duffus and Spry, JJ.A. which I have had the advantage of reading in draft. So far as the second ground of appeal is concerned, which contends that the damages awarded to the respondent should be reduced, having regard to the fact that the Central Government police were responsible for 40 out of the 49 days during which the respondent was wrongly detained, I can see no difficulty. The whole period of wrongful detention was a direct consequence of the original unlawful arrest, and if the appellant Administration is responsible for its Local Commander's tortious act in wrongfully arresting the respondent, it is also responsible for the consequences which flow as a natural, probable and foreseeable result of that act. In my view, this ground of appeal fails.

The first ground of appeal raises a question of considerable difficulty, and one of great importance to the public, and that is whether a District Administration in Uganda is vicariously liable for the torts committed by a member of the Administration police force who is independently performing statutory duties. The statute law of Uganda is silent on the point, and Mr Clerk for the appellant Administration has submitted that in these circumstances the common law applies, in accordance with s. 3 (2) of the Judicature Act. By section 3 (3) of that Act:

> ". . . the common law . . . shall be in force only in so far as the circumstances of Uganda and of its people permit, and subject to such qualifications as circumstances may render necessary."

Mr Clerk has satisfied me that in England, and in other Commonwealth countries which apply the common law such as Australia and Canada, a local authority which employs and pays a constable is not liable for the constable's torts, because the constable exercises his powers, whether conferred by common

or statute law, by virtue of his office and on his own responsibility. He exercises an original, and not a delegated authority, and the general principles arising out of agency or a master and servant relationship have no application (*Fisher v. Oldham Corporation*, [1930] 2 K.B. 364). In *Attorney-General for New South Wales v. Perpetual Trustee Co*., [1955] 1 All E.R. 846, which was an appeal to the Privy Council from the High Court of Australia, Viscount Simonds in delivering the judgment of the Board said, at p. 858:

> ". . .there is a fundamental difference between the domestic relation of master and servant and that of the holder of a public office and the state which he is said to serve. The constable falls within the latter category. His authority is original, not delegated, and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract. The essential difference is recognized in the fact that his relationship to the Government is not, in ordinary parlance, described as that of servant and master."

Mr Clerk has, very persuasively, submitted that the position of a constable in a District Administration police force is the same as that of a constable under the common law: he is not subject to the directions of his employer as to the manner in which he performs his official duties, so that no relationship of master and servant exists so as to give rise to vicarious responsibility on the part of the employer. The learned trial judge commented on the fact that in *Fisher's* case (*supra*) as well as in the *Perpetual Trustee* case (*supra*) importance was attached to the fact that a constable in England and Australia takes an oath to serve the Crown, and this fact was described by McCardie, J. in *Fisher's* case (*supra*) as "a characteristic mark . . . of the conversion of a local administrative officer into a ministerial officer of the Crown". An Administration police officer, so far as I am aware, is not required to take an oath to serve his Government. Another material factor is that local authorities in England who employ and pay constables do so as a matter of administrative convenience, and not in the discharge of any duty imposed upon them by law to ensure the maintenance of law and order. An Administration, on the other hand, has such a duty imposed upon it by statute; see ss. 22 and 23 of the Local Administration Act. These matters are sufficient to distinguish between a member of an Administration police force and an English policeman. The latter, when carrying out his duties, acts as an officer of the Crown and a public servant and not as the servant of the authority which employs him. The former, in the view of the trial judge, acts as a servant of the Administration which employs and pays him. I see no reason to differ from this conclusion. The Administration policeman has taken no oath to serve the Government, and has not in my opinion the status of a ministerial or public officer. He is a servant of the Administration, employed as a "duly appointed agent" (to use the terminology of s. 22 of the Local Administrations Act) to enable the respondent Administration to carry out its statutory duties, which include assisting in the maintenance or order and good government within its geographical area. I would dismiss the appeal. At the same time I would endorse what Spry, J.A. says about the necessity for legislation to clarify the question of responsibility for arbitrary and illegal action by members of the Central Government and Administration police forces, examples of which regularly come to our notice. It would be most unfortunate if the ordinary man, who suffers from these actions, were left to pursue his remedy against the individual policeman concerned.

Spry JA: The respondent sued the West Nile District Administration (to whom I shall refer as the Administration) for damages for wrongful arrest and detention, having been arrested and detained by the Local Commander of

the West Nile District Administration Police Force. The learned trial judge found that the arrest and detention had been unlawful and there has been no appeal against that finding. He further found that the relationship of master and servant had existed between the Administration and the Local Commander and that the Local Commander had been acting within the scope of his employment at the time of the arrest and therefore that the Administration was vicariously liable for his tortious act. He awarded damages of Shs. 14,000/-. The Administration now appeals against the finding of liability and against the quantum of damages.

The Administration was apparently established under the Local Administration Act (Cap. 25) (now repealed) and the basis of the learned judge's decision appears to be that the combined effect of s. 3 of the Police Act (Cap. 312), which requires local administrations to establish police forces, and s. 23 of the Local Administration Act, which imposes on local administrations a duty to co-operate with the Government in preventing the commission of offences and in the arrest of offenders and for those purposes empowers local administrations to establish police forces, is to create the master and servant relationship. From that, he concludes that the Local Commander was acting within the scope of his employment when he made the arrest.

The position of the Local Commander of an administration police force at the relevant date was in some respects a curious one. The force itself was established by and apparently paid by the local administration but the power to appoint, exercise disciplinary control over or to dismiss the Local Commander was vested in the President of Uganda, acting on the advice of the Public Service Commission, by virtue of art. 110 (1) of the 1966 Constitution. By virtue of art. 81 (2) of the Constitution, the Local Commander was bound to obey the operational commands of the Inspector-General. Subject to this, as a police officer for the purposes of the Police Act, he was, under s. 26 (1), bound to

> "obey all lawful directions in respect of the execution of his office which he may from time to time receive from any competent authority".

(Competent authority is not defined.) Under the same provision, he was under a duty to

> "exercise such powers and perform such duties as are by law conferred or imposed on police officers"

and, as a police officer within the meaning of the Criminal Procedure Code Act (Cap. 107), he had the power to arrest without warrant conferred by s. 23 of that Act. Generally, he exercised his powers concurrently with the officers of the Uganda police force, but if required to operate in a municipality or Government town, took orders from the officer in charge of the force in that place (Police Act, s. 87G (3)).

In these circumstances, it seems to me that while, in certain specific respects, a master and servant relationship may have existed between the Administration and the Local Commander and between the Uganda Government and the Local Commander, there cannot be said to have been any general relationship of master and servant. It would seem that, apart from his rights and powers as a private citizen, the Local Commander might find himself in any of three capacities according to the circumstances: he might be acting in pursuance of lawful orders given him by the Administration; he might be acting under the directions of the Inspector-General; or he might be acting in his own individual authority as a police officer. It is, I think, a question of mixed fact and law in which capacity he was acting at any given time.

Before leaving this subject, I think I should comment briefly on the relevant

provisions of the Local Administrations Act, as I understand them. In the first place, a duty was imposed on every administration to discharge the functions conferred on administrations (s. 22). Secondly, a duty was imposed on every administration to assist the Government in the discharge of certain Government functions, including the arrest of offenders (s. 23). It is not, I think, without significance that the arrest of offenders was treated as one of the matters in which the administrations were to assist the Government, not as one of the functions of administrations. Moreover, s. 23 did not, of itself, confer on administrations or their officers any power of arrest; for the powers of Administration police officers, it is necessary to look to other statutes, such as the Police Act and the Criminal Procedure Code Act. On the other hand, Part VII of the Act provided for the appointment of chiefs and expressly conferred on them the power of arrest in certain circumstances (s. 41). The inference from these provisions is, in my opinion, that when an officer of an Administration police force made an arrest, he was to do so by virtue of his status as a police officer, not as an employee of the Administration.

I turn then to the question whether, assuming that for some purposes the Local Commander was the servant of the Administration, he can have been acting in that capacity when he arrested the respondent. The learned trial judge found that the arrest was not made in pursuance of a warrant lawfully issued. He said:

> "It is clear that Mr Angila arrested the plaintiff in the exercise of his powers under section 23 of the Criminal Procedure Code, if he knew of them. That section alone would have justified the arrest."

At English Common Law, a constable who exercises his power of arrest without warrant does so on his own responsibility. This was expressed most clearly in an Australian case, *Enever v. The King*, [1906] C.L.R. 969. Unfortunately, the report is not available here, but there are substantial quotations from it in the judgment of McCardie, J., in *Fisher v. Oldham Corporation*, [1930] 2 K.B. 364, of which I would repeat one, from the judgment of Griffith, C.J.:

> "Now, the powers of a constable, qua peace officer, whether conferred by common or statute law, are exercised by him by virtue of his office, and cannot be exercised on the responsibility of any person but himself A constable, therefore, when acting as a peace officer, is not exercising a delegated authority, but an original authority, and the general law of agency has no application."

I know of nothing in the statute law of Uganda that contradicts or is inconsistent with that statement and in the absence of any such provision the English Common Law applied, subject only to the qualification that it applied "only so far as the circumstances of Uganda and its inhabitants permit". I see no occasion here to invoke that qualification.

The learned judge felt that he could distinguish *Fisher's* case, mainly, I think, on the ground that the decision had largely turned on the form of oath which in England a constable is required to take. It is true that that was one of the factors considered by McCardie, J., but another factor to which he gave, I think, at least equal importance was that the local authority could not control the exercise by a constable of his statutory powers, and he ended his judgment with the comment that if local authorities were to be responsible for the acts of the police, they would be entitled to demand a full measure of control over them. Those observations appear equally relevant here.

It has not been argued before us that the Administration had any legal authority to direct the Local Commander to make an arrest and I would agree

with Mr Clerk's submission that any such direction if given could neither add to nor derogate from the Local Commander's statutory power of arrest. Moreover, the Local Commander himself did not claim to have been acting under any such express direction: he merely said that he was told to investigate and arrest the guilty person.

In my view, that is enough to dispose of this appeal, without going into the wider issues that were touched on before us. I do not consider that a general relationship of master and servant existed between the Administration and the Local Commander and I do not consider that in arresting the respondent the Local Commander was acting as the servant or as the agent of the Administration. While having every sympathy for the respondent, I would allow this appeal.

I would add two general observations. In the first place, I think the state of the law regarding liability for unlawful arrest and detention is most unsatisfactory and I hope it will be drawn to the attention of the proper authorities. Secondly, I am perturbed at the casual way in which, it appears, arrests are being made and at the frequency with which we hear of unlawful detention. In the present case, the Local Commander does not appear to have been clear even in his own mind, on what charge he was arresting the respondent and no attempt whatever appears to have been made to comply with ss. 27, 30 and 31 of the Criminal Procedure Code Act. This constitutes a grave interference with the liberty of the citizen.

Appeal dismissed.

For the appellant:
Anil Clerk
Anil Clerk, Kampala

For the respondent:
BKM Kiwanuka
Kiwanuka & Co, Kampala

Kekinyumu v Uganda
[1969] 1 EA 333 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	16 December 1968
Case Number:	649/1968 (36/69)
Before:	Jones J
Sourced by:	LawAfrica

[1] Criminal law – Offensive weapon – Found carrying a knife in a public place – Emergency Regulations, regs. 13 (1) *and* 22 (*U.*).

[2] Criminal law – Political uniform – Wearing of – Whether accused was wearing a recognized

uniform – No definition of "uniform" – Emergency Regulations, regs. 12 (1) *and* 22 (*U.*).

Editor's Summary

The appellant was convicted on two counts of contravening the Emergency Regulations in that (1) he was found wearing the uniform and insignia of a political organization contrary to s. 12 (1) and s. 22 of the said regulations and (2) he was found carrying an offensive weapon in a public place contrary to s. 13 (1) and s. 22. The appellant was found wearing a hat, tie, shirt and shoes of green and white, allegedly the colours of the Democratic Party, and a badge reading "Ben Kiwanuka, 1st Premier, Uganda D.P." The appellant was also carrying a knife. When arrested by the police, the appellant was alleged to have said that he knew it was an offence to wear this uniform in

Buganda. No evidence was led to show whether there was a Democratic Party uniform or whether the appellant's dress conformed to that uniform. On count 2, the particulars of the charge stated that the appellant was found carrying a knife in a public place, namely on a verandah of Bhagwanji's shop.

Held –

(i) in the absence of any evidence as to what was the uniform of the Democratic Party, the conviction on the first count could not be sustained;

(ii) the verandah of a shop was not a place or building to which the public was entitled as of right to have access but merely enclosed a piece of pavement on which the public was permitted to walk;

(iii) in the absence of any dedication to the public, the verandah was private property and the appellant was not therefore carrying the offensive weapon in a public place in terms of s. 13 (1).

Appeal allowed.

Cases referred to in judgment:

(1) *Smaje v. Balmer,* [1965] 2 All E.R. 248.

Judgment

Jones J: On August 14, 1968 the appellant John Helman Serunkuma Kekinyumu appeared before the Acting Chief Magistrate, Masaka.

He was charged on two counts.

The first was wearing a political organization uniform and insignia contrary to ss. 12 (1) and 22 of the Emergency Regulations.

The particulars of offence were as follows:

> "John Helman Serunkuma Kekinyumu on the 16th day of July, 1968, at Masaka Township in the Masaka District while in a public place, namely on a verandah of Bhagwanji's shop, you were found wearing uniform and insignia of a political organization to wit, a hat, shoes, shirt, tie, handkerchief, all bearing Democratic Party colours and one badge reading 'Ben 1st Premier of Uganda D.P.' thus signifying your association with Democratic Party which is a Political Party."

The second count was "carrying an offensive weapon in a public place contrary to ss. 13 (1) and 22 of the Emergency Regulations".

The particulars of offence were:

> "John Helman Serunkuma Kekinyumu on the 16th day of July, 1968, at Masaka Township in the Masaka District, you were found carrying an offensive weapon, to wit, one knife – in a public place – namely on a verandah of Bhagwanji's shop."

The main witness for the prosecution was D/Sgt. George William Chambers. He testified that on July 16, 1968 he was on duty as a C.I.D. Officer at 10.00 a.m. in Masaka Town. He saw the accused on the verandah of the shop of a man called Bhagwanji. The accused was dressed in a hat, tie, shirt, shoes. All these articles were green and white. He was also wearing a badge on his shirt reading "Ben Kiwanuka 1st Premier Uganda D.P."

Sgt. Chambers asked his name. The accused replied that he had no right to ask his name. Chambers then disclosed his identity and asked him why he was wearing these party political colours, and that he knew that it was wrong to wear uniform in Buganda. He replied that he did not know that it was bad to wear a political uniform.

When Chambers saw that he was also carrying a knife he asked him why he wore a knife, to which the accused replied that he was wearing it as a protection against thieves.

Chambers asked him to go to his office. "He agreed to go voluntarily."

Chambers handed him over to one Inspector Rullunga. The accused was searched by Chambers in the presence of Insp. Rullunga. He found:

(*a*) four badges similar to the one he was wearing on his shirt;

(*b*) in a brief case which he was carrying –

(i) *The Democratic Party*

(ii) and some political documents;

(*c*) a green and white bow-tie tied in a green and white handkerchief. (It was in fact a white handkerchief with a green border and green lines all around it.)

In cross-examination Chambers said that it was within his knowledge that the colours he wore were Democratic Party colours and that he knew that what he wore was a Democratic uniform, i.e. a green and white hat, tie (which was silver and green anyway), green and white shirt, and shoes, together with the badge.

He insisted that a green stripe was painted on a white pair of plimsolls. They appeared to me to be an ordinary looking pair of shoes (with a green stripe), which can be bought in many shoe shops and which are sometimes seen being worn by athletes at athletic meetings.

The knife was one which was encased in a sheath. It could be used for innocent and legitimate purposes as well as other purposes.

The accused, an old man of 82, was convicted on both counts by the Acting Chief Magistrate, and fined Shs. 1,000/- or six months on count 1, and Shs. 250/- or two months on count 2. It was against that conviction that the accused was appealing.

There were seven points in the appeal.

The first was that the Acting Chief Magistrate misdirected himself when he decided that the clothes used by the appellant were a political uniform and in particular the Democratic Party uniform.

It is obvious that one must consider first and foremost the crucial question whether what the accused was wearing was a uniform, and the Democratic Party (D.P.) uniform, in particular. If it were not, then no offence was committed under s. 12 (1) of the Regulations.

Secondly, whether the verandah of Bhagwanji's shop was a public place or not, within the meaning of the Regulations. If it were not, then it would seem from the section that no offence was committed. A uniform or insignia worn in private or on private property, as long as there is no meeting, assembly, procession or gathering whatsoever taking place on the private property, does not seem to be an offence.

In his judgment, at page 27 of the record, the learned Chief Magistrate said that he was satisfied that the accused was not wearing the badge. That makes Chambers' evidence at once suspect, as he said that he wore this badge which referred to the fact that "Ben was the first Prime Minister D.P."

The learned magistrate, however, seems to have glossed over Chambers' categorical statement that he was wearing the badge, in the following way, and does not seem to have considered that his evidence ought to have been treated with reserve:

> "To this extent, the policemen, who gave evidence before me have been muddled up presumably by subsequent events. Save for this confusion on their part, I accept their evidence – the quintessence of Regulation 12 (1) is the general appearance of any individual dressed in political attire."

In my view the learned magistrate fell into error here. The accused was not charged with having the general appearance of an individual dressed in political attire. He was specifically charged with being "found wearing *uniform* and insignia, of a political organization . .".

To convict the accused the magistrate ought to have found (1) that there is a recognized D.P. uniform, and (2) that what the accused was wearing was such a uniform.

No evidence was called to prove these two points.

The only evidence, if it can be called evidence on this question, was what Chambers said, and what the accused is alleged to have said in his charge and caution statement. Chambers in his evidence said:

> "I asked him why he was wearing *these political party* colours?"
>
> "I knew it was an offence to wear this uniform in Buganda."

He seems to have confused "Party Colours" with uniform. Evidence ought, in my view, to have been called to prove that such and such articles of clothing have been adopted as a Democratic Party uniform, which all members *must* wear, at all times or at particular times, and that the articles worn by the accused comprised one such uniform. This could have been done by producing the Constitution of the Democratic Party.

The whole question has been made more difficult as nowhere does there seem to be a definition of "uniform". I have looked at the Public Order Acts in England, which were designed to deal with Fascists and the like. English Fascists had a distinctive dress such as black shirts, badges, belts etc., which were *uniformly* worn by *all members* of the party at all times. The draughtsmen of the Act must have thought that "uniform" did not need any definition as most people would know at once what it meant.

The nearest thing to a definition I could find was in Halsbury's Continuation Volume No. 29 of the Complete Statutes of England at page 58:

> "Uniform is not defined in this Act and is a word which may possibly give rise to difficulties in interpretation. The word is to be understood in its ordinary meaning and its application to the sort of costume which has rendered the Act necessary is obvious. Between uniform of this type and mere badges there is a wide gap and it is difficult to know where exactly the line is to be drawn."

I must ask myself, therefore, whether the "costume" worn by the accused was the D.P. one which had rendered these Regulations necessary. The "costume" or articles worn by this man resembled more the "costume" of a circus clown than a *uniform*, and there was no evidence that one single person other than the accused had been seen in such a costume. The learned State Attorney agreed that he was more "a figure of fun" than anything else.

The learned Acting Chief Magistrate seems to have laid great stress on the accused's charge and caution statement in convicting him. In the absence of direct evidence of what the D.P. uniform was, if any, the policemen's evidence was merely what they *thought* the D.P. uniform was. In fact they confused them with D.P. colours.

I know the Regulation speaks of "an article of apparel signifying his associations

with a party". I am not going to decide whether, if the charge had read "article of apparel signifying his association with a political party", the accused could have been guilty. I must consider this case as I find it. The accused was plainly *charged* with *wearing* "a *uniform* and insignia of a political party".

As the policemen's evidence was only what they "thought" and considered to be the D.P. uniform and nothing else, the accused could only have been convicted on what he had said in his charge and caution statement, which seems to have been taken as a confession. I do not know whether there is an exact word for "uniform" in Luganda or whether the accused realized the significance or implication of the word. Be that as it may, it is one of the fundamental principles of our law that no one ought to be compelled to give evidence against himself. That is what the use of a confession really means. It follows that when the only real evidence against the accused is his confession, he ought not to be convicted on his confession alone.

When arguing the appeal, the learned State Attorney said:

> "As to Count 1. I leave it to the Court. They have not led evidence on Count 1. I am not supporting it."

From the facts, I do not consider that the prosecution have proved that this man was wearing a uniform. I do not propose to deal with the question of whether Bhagwanji's verandah was a public place in connection with this Count, I will deal with it when I come to Count 2. In view of what I have said above, coupled with the State Attorney's view, I have no alternative but to allow the appeal on Count 1, quashing the conviction and setting aside the sentence.

I now turn to Count 2.

Section 13 (1) of the Emergency Regulations reads:

> "Any person, other than a police officer or a member of the Armed Forces, or any person acting with proper authority in support of the police or the Armed Forces, who carries any firearm, stick, missile, or weapon of any description in any public place commits an offence under these Regulations."

An offence is committed when any one carries:

(1) any firearm,

(2) stick,

(3) missile or weapon,

in a public place.

In this case the prosecution had to prove:

(1) that the knife carried by the accused was a weapon;

(2) that it was in a public place, i.e. that the verandah of Bhagwanji's shop was a public place.

A knife could only be a weapon. A weapon is not defined either in the Emergency Regulations or the Penal Code. Webster's Dictionary defines it as:

> "An instrument of offence or defence, a thing used to inflict bodily harm: anything used for attack or defence."

From *Smaje v. Balmer*, [1965] 2 All E.R. 248, the words offensive weapon postulate a weapon or instrument made or adapted or intended for causing injury to a human being. Section 1 (4) of the Prevention of Crimes Act 1953 defines an offensive weapon as

> "any article made or adapted for use for causing injury to the person, or intended by the person having it with him, for such use by him."

There can be no doubt that this knife could be used for offence or defence and could inflict bodily harm. The accused in fact admitted that he carried it as a defence against thieves, when questioned by Chambers. It could be used for innocent purposes also.

I am satisfied that this knife with a blade about 4 inches to 6 inches long with a pointed end could be defined as a weapon within the term, and came within this particular section.

Was this weapon carried in a public place? There is no evidence that he had the knife before he went on the verandah. The prosecution were content to charge him with having a knife *on the verandah* of Bhagwanji's shop which they considered a public place.

In dealing with the facts relating to Count 2 the learned magistrate had this to say:

> "In Count 2, the Prosecution has only to establish that the accused carried the knife; as he is not charged with displaying it, whether the sheath in which it was encased protruded outside his shirt or not, is immaterial. The word 'carry' is not defined in these Regulations, therefore it is my duty to confer upon it its natural meaning. The Concise Oxford Dictionary defines it as 'convey, transport, bear, support, hold up, have about the person ready for use'. Accused first said that he was carrying the knife in the scabbard around his hip, to peel fruits; in cross-examination however, he was constrained to admit that he was carrying it for his protection against thieves, as is recorded in his statement. This is yet one more illustration of his calculated dishonesty. In Regulation 12 (3), the words 'being worn, displayed and carried' appear thereby demonstrating that the legislation did not contemplate such subtle distinction in Regulation 13 (1); significantly, to carry an innocuous stick under certain conditions in a public place in Masaka District would be courting a conviction under Regulation 13 (1); my function is not to question the wisdom of the legislation, but to interpret it in a judicious manner however unpalatable the terminology therein may be. The admission by the accused that he carried the sheathed knife which certainly does look offensive, tied to a greenish strip of cloth around his waist, constitutes a contravention of Regulation 13 (1) according to my construction thereof. I therefore convict him as charged on Count 2."

He has misdirected himself. The prosecution have to prove (1) that he carried it (which I think they did), also (2) that he carried it in a public place, otherwise it is no offence.

In this particular case, the charge defined and restricted carrying to "*Bhagwanji's verandah*". The learned Acting Chief Magistrate did not deal specifically with the question whether Bhagwanji's verandah was a public place or not, as far as Count No. 2 was concerned, but he did as far as Count No. 1 is concerned.

In dealing with the question on Count 1, he said this:

> ". . . there is no doubt at all, nor is there any controversy revolving around the proposition that the verandah is a *public place*; Lalji Tejuna has testified to the effect that it is a public place, there is also the testimony of George William Chambers and B. Rullinga, which inescapably classifies the verandah as '*a public place*' as defined *in the Penal Code*."

A verandah is described in Webster's Dictionary as "a light external gallery

or portico with a roof and pillars, along the front or side of the house". If this was Bhagwanji's verandah, it must have been attached to his shop and *private* property.

Chambers *merely* said: "I met accused *in* the verandah of Bhagwanji's shop. There were other people there." That does not *prove* that the verandah was a public place. The second prosecution witness's evidence was short:

> "I own a shop in Masaka on Masaka/Kampala Road, it is known as Bhagwanji Lalji Ltd., *it has a verandah. The verandah is a public footpath.*"

If Bhagwanji Lalji Ltd. have built a verandah over a public footpath, they have encroached on land which was not theirs. What he undoubtedly meant is that the public used it in passing his shop.

There is no evidence whether this shop was in the back street or main street or whether the "footpath" was murram or not.

Rullinga said nothing at all about the verandah in his evidence, so I do not know how his testimony at any rate "inescapably classified" the verandah as a public place.

The appellant apparently was sitting on the verandah, so he must have been sitting in a "private footpath" if what the second prosecution witness said were correct.

A public place is defined in the Penal Code s. 4 (viii) as:

> " 'public place' or 'public premises' includes any public way and any building, place or conveyance to which, for the time being, the public are entitled or permitted to have access either without any condition or upon condition of making any payment, and any building or place which is for the time being used for any public or religious meetings or assembly or as an open court."

The whole essence of a public place is that public are entitled as *of right* to be on the premises, either because the place is a public property as opposed to private property and access to it is not prohibited, or any *building* to which the public are *entitled* or permitted to have access, either without any condition or upon condition of making payment. It seems to me that the verandah of a shop would hardly fit into that description. A shop and its verandah is used by people who go into the shop for the purpose of purchasing goods. A verandah might enclose a piece of pavement along which a person is *permitted* to walk, but not to dally. There is no question of the public being entitled to as of right, unless it has been dedicated to the public, when it ceases to be private. There can be no doubt that in this case the verandah was Bhagwanji's, i.e. private, property, and that the accused was sitting on it.

When the learned State Attorney was asked in what capacity he thought the accused was permitted to use the verandah, he said as an invitee. That means there must have been an invitor – the owner of the shop.

I am not satisfied that the Acting Chief Magistrate has dealt with this question adequately or at all in his judgment. The question whether the verandah was a "public place" is of paramount importance to a conviction on both Count 1 and Count 2.

In view, therefore, of his misdirection and nondirection in respect of Count 2, I quash the conviction and set aside the sentence.

Appeal allowed.

For the appellant:

BK Kiwanuka
Kiwanuka & Co, Kampala

For the respondent:
AM Khan (Senior State Attorney, Uganda)
Director of Public Prosecutions, Uganda

Nilani v Patel and others
[1969] 1 EA 340 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	20 February 1969
Case Number:	615/1959 (39/69)
Before:	Dickson J
Sourced by:	LawAfrica

[1] Civil Practice and Procedure – Want of prosecution – Dismissal of action – Grounds for – Delay by plaintiff – Civil Procedure Rules, O. 15, *rr*. 2, 5 *and* 6 (*U.*).

Editor's Summary

This suit was filed in August, 1959 and in November, 1959 it was fixed for hearing in March, 1960. It was adjourned by consent because the plaintiff was out of the country and was relisted for October, 1960. It was then again adjourned because a witness for the plaintiff was out of the country. In 1963 the suit was relisted for December, 1963 but was again adjourned at the instance of the plaintiff. No further step was taken to bring the suit to hearing for a period of more than twelve months. The applicants applied to dismiss the suit for want of prosecution. The plaintiff argued that there was no power of dismissal under the rules.

Held –

(i) there was power to dismiss the suit under Order 15, rule 6, Civil Procedure Rules;

(ii) there had been inordinate delay by the plaintiff which was inexcusable and the suit would be dismissed. (*Allen v. Sir Alfred MacAlpine & Sons Ltd*. (5) adopted.)

Suit dismissed.

Cases referred to in judgment:

(*1*) *Eaton v. Storer* (1882), 22 Ch. D. 91.

(*2*) *Saldanha & Others v. Bhailal & Co. and Others*, [1968] E.A. 28.

(*3*) *Ahmed Hassan Malji v. Shirinbai Jadavji*, [1963] E.A. 217.

(*4*) *Fitzpatrick v. Batger & Co. Ltd*. (1967), 111 Sol. Jo. 216; [1967] 2 All E.R. 657.

(*5*) *Allen v. Sir Alfred MacAlpine & Sons Ltd.*, [1968] 1 All E.R. 543.

Judgment

Dickson J: This is an application, by the second, third and fourth defendants under O. 15, r. 6 of the Civil Procedure Rules for an order that the plaintiff's suit against them be dismissed.

Order 15, r. 6 reads:

> "In any case, not otherwise provided for, in which no application is made or step taken for a period of two years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed. In such case the plaintiff may, subject to the law of limitation, bring a fresh suit."

Referring briefly to the history of this matter, this suit was instituted by the plaintiff as far back as August 4, 1959. The plaintiff by his plaint prays *inter alia* for judgment against the four defendants jointly and severally for the sum of Shs. 12,000/- being arrears of rental of premises for the period January, 1959,

to June, 1959. The necessary appearances were entered soon thereafter and defences duly filed. On November 13, 1959, by consent of the parties, the suit was fixed for hearing on March 4, 1960. On March 3 of the same year, in pursuance of representations made by Russell & Co., who were appearing for the plaintiff, the parties agreed that the suit should be adjourned from the hearing list of March 4, the reason it would seem being that the plaintiff was out of the country. By consent of the parties the hearing was fixed for October 6, 1960. On October 3 it was adjourned again pursuant to representations made on behalf of the plaintiff to the effect that a witness for the plaintiff was out of the country. It appears that since that date for a period of nearly three years no further step was taken, until September 7, 1963, when by consent of the parties the suit was fixed for hearing on December 18, 1963. On November 28, 1963, again on representations being made on behalf of the plaintiff by his advocate, the suit was adjourned sine die by consent of the parties. No further step has been taken by either party since then to bring this suit to trial.

There can be no doubt that every adjournment was at the instance of the plaintiff and for about five years since the adjournment in 1963 he did nothing to set down the case for hearing. Counsel for the respective defendants quite rightly in forcible language criticized the plaintiff for this inordinate delay and strenuously urged that the suit be dismissed for want of prosecution. It is only too trite to say that, as in every civil suit, it is the plaintiff who is in pursuit of a remedy, that he should take all the necessary steps at his disposal to achieve an expeditious determination of his claim. He should not be guilty of laches. On the other hand, when he fails to bring his claim to a speedy conclusion, it is my view that a defendant ought to invoke the process of the court towards that end as soon as it is convenient by either applying for its dismissal or setting down the suit for hearing.

Mr Mboijana, who it would seem took over the firm of Russell & Co. when Mr R. G. Russell was elevated to the High Court Bench of Uganda in 1965, contends that the plaintiff had not been apparently informed of the change. albeit Mr Russell notified his clients that they were at liberty to instruct the firm of Mboijana & Co., or to brief any other firm of advocates. Having heard Mr Mboijana, and after reading his affidavit, I am not persuaded that his client, the plaintiff, was unaware of the change. The crux of the matter appears to be contained in a letter dated September 27, 1967, and addressed to Mr S. V. Pandit, counsel for the third defendant. It seems that the plaintiff had never paid Russell & Co. its fees in full and there was a balance of Shs. 925/- of the provisional fees owing which had never been paid despite numerous statements sent to him. A copy of that letter was sent to the plaintiff by Mboijana & Co. It is evident that the plaintiff was no longer interested in pursuing his claim; if he were, he would have paid the balance of the fees to his advocate prior to the letter of September 27, 1967. As Mr Pandit has, in my opinion, aptly stated it is the client who must seek not his advocate. In all probability, the plaintiff did not go to his advocates because of the matter of his indebtedness for fees.

Mr Dalal has referred to *Allen v. Sir Alfred McAlpine & Sons Ltd*., [1968] 1 All E.R. 543. It is quite apparent from the judgments of the Court of Appeal, to put it tersely, that it frowns on delays of this kind – situations like these are deplored. It was argued in the Court of Appeal that the courts should never, on the first application, dismiss the action for want of prosecution. Even if there was a long delay one more chance must be given; and that the order should be that the action should be dismissed “unless” the solicitor takes the next step within a stated time. It was further argued that it had been the practice for many years and was confirmed by Sir George Jessel, M.R. in *Eaton v.*

Storer (1882),22 Ch. D. 91, and that the practice should not be changed without prior notice. Lord Denning, M.R. said that he could not accept that suggestion. If there were such a practice, there would be no sanction whatsoever against delay. His Lordship went on to say at page 547:

> "If you read *Eaton v. Storer* carefully, it will be seen that the practice described by Sir George Jessel, M.R., applied only to moderate delays of two or three months. It does not apply when 'there is some special circumstances such as excessive delay'. The principle on which we go is clear: when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away, leaving the plaintiff to his remedy against his own solicitor who has brought him to this plight. Whenever a solicitor, by his inexcusable delay, deprives a client of his cause of action, the client can claim damages against him; as, for instance, when a solicitor does not issue a writ in time, or serve it in time, or does not renew it properly. We have seen, I regret to say, several such cases lately. Not a few are legally aided. In all of them the solicitors have, I believe, been quick to compensate the suffering client; or at least their insurers have. So the wrong done by the delay has been remedied as much as can be. I hope that this will always be done."

In the judgment of Denning, M.R. at page 546 he referred to *Fitzpatrick v. Batger & Co. Ltd*. (1967), 111 Sol. Jo. 216 where the Court of Appeal said:

> "Delay in these cases is much to be deplored. It is the duty of the plaintiff's advisers to get on with the case. Every year that passes prejudices the fair trial."

That is so. Witness may have died where a period of over nine years have elapsed (as in the case here), documents may have been mislaid, lost, or destroyed, and the memory tends to fade.

In the instant case, I do not think the plaintiff's advisers are to be blamed. The delay it would seem falls full square on the plaintiff himself. I would have thought he would have exhibited an affidavit.

Be that as it may, I turn now to strictly procedural matters. Order 15, rr. 2, 5 and 6 are identical in terms with Order 16, rr. 2, 5 and 6 of the Kenya Civil Procedure (Revised) Rules 1948, with the exception of the period of three years stated in O. 16, r. 6 of the Kenya rule. In our corresponding r. 6 the period is two years as has been quoted earlier in this ruling.

It is convenient to set out rr. 2 and 5 of Order 15 of our rules:

> "2. Where the hearing of a suit has been adjourned generally, the court may, if no application as aforesaid is made within twelve months of the last adjournment, give notice to the parties to show cause why the suit should not be dismissed, and if cause is not shown to the satisfaction of the court, the suit shall be dismissed.
>
> 5. If the plaintiff does not within eight weeks from the delivery of any defence, or, where a counterclaim is pleaded, then within ten weeks from the delivery thereof, set down the suit for hearing, then the defendant may either set down the suit for hearing or apply to the court to dismiss the suit for want of prosecution, and on the hearing of such application the court may order the suit to be dismissed accordingly, or may make such other order, and on such terms, as to the court may seem just."

Now in *Saldanha and Others v. Bhailal & Co. and Others*, [1968] E.A. 28 an action was filed in June, 1955, complaining of events as far back as 1951 and

concerning activities in 1952 and 1953. It was listed for hearing in January, 1956, but was taken out of the list by consent, and again in 1957, 1959, 1960 and September, 1961. Nothing then happened until January 6, 1964, when it was again listed for hearing in May, 1964. In May, 1964, it was adjourned on the application of the plaintiffs. In January, 1965 a new hearing date was fixed for June, 1965, but the action was again adjourned by consent. An unsuccessful attempt was made in May, 1967 to fix another hearing date. Finally, in October, 1967 the defendants made an application to have the action dismissed under O. 16, rr. 5 and 6 of the Civil Procedure (Revised) Rules 1948, as well as under s. 97 of the Civil Procedure Act; but at the hearing the applicants relied only on the inherent power of the court under s. 97, which is also identical in terms with our s. 101 of the Civil Procedure Act, which reads:

> "Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

It was held, there being specific provisions in O. 16 and O. 9, r. 16 of the Civil Procedure (Revised) Rules 1948 for the dismissal of suits for want of prosecution there is no inherent power to dismiss the suit for want of prosecution The case of *Ahmed Hassan Malji v. Shirinbai Jadavji*, [1963] E.A. 217 was applied. Dalton, J. in giving his ruling in that case said at page 29:

> "This application is made under the provisions of O. 16, rr. 5 and 6 or other rule applicable and also under s. 97 of the Civil Procedure Act. In fact counsel for the applicants has not argued that rr. 5 and 6 apply in this case and I do not think that it would be argued that r. 5 applied, nor for that matter can r. 6 apply since the history of this case does not show that no step was taken by either party with a view to proceeding with the suit for three years, though between the years 1961 and 1964 the period of three years was nearly reached. No other rule has been mentioned in the course of the argument as being relevant to this application. Counsel for the applicants' application therefore, it seems to me, must rest on the provisions of s. 97 of the Civil Procedure Act."

As I see it, in the instant case, O. 15, r. 2 could not apply and the respective counsel for the defendants no doubt fully appreciate that fact, for their application is not based under O. 15, r. 2. There can be no doubt from the history of the case that the suit was adjourned generally by consent on November 28, 1963. A period of more than twelve months had therefore elapsed. No application had been made to the court during the currency of the twelve months' period since the case had been adjourned generally. It is only too obvious from the history that r. 5 is also inapplicable.

Now as to r. 6, it is submitted by Mr Mboijana that where a suit is *adjourned generally*, as it was in this case, in November, 1963, r. 6 cannot apply, for no application was made within twelve months of the last adjournment and no notice was given to the parties to show cause. He contends that the application is misconceived and must be therefore dismissed. If Mr Mboijana is right, it means that if no application is made within twelve months of the last adjournment, the fact that a case has been adjourned generally gives a plaintiff a right, if he chooses, to do nothing. He is given complete licence under the law to remain static for an indefinite period, and be even allowed to keep the suit pending until the end of time, and there is nothing a defendant can do about it. I do not think any judicial rule-making authority could have intended such an absurd situation to exist, when it has always and still is the practice of the courts to brook no delay in bringing a case to trial. No rule-making authority would wish to create such an unreasonable situation of permitting actions to

hang over the head of any defendant for an indefinite period, without giving him the right to move the court to have the action dismissed for want of prosecution.

As was said by Denning, M.R. in *Allen v. McAlpine* at page 552:

> "Just consider the position of the widow, Mrs Hammond. Her husband is charged with fraud and conspiracy, which is said to have taken place fourteen years ago. He is not here to defend himself. She has to do it for him. She has been unable to administer the estate whilst this claim is hanging over it. Two years ago she protested about the delay and her solicitors warned the plaintiffs' solicitors of the consequences. Since that warning there has been another year's delay. If this case is allowed to drag on indefinitely, she may herself be dead before it comes to trial, as well as her husband. The other alleged conspirator, the building company, is already dead. It was dissolved nearly three years ago. So it is an action for fraud and conspiracy fourteen years ago in which both the conspirators are dead. A fine state of affairs!
>
> Now consider the position of the solicitors, J. H. Milner & Sons. The action charged them also with fraud and conspiracy fourteen years ago. That charge was kept hanging over their heads for four or five years. Then it was dropped. The property company still charges them with misconduct as solicitors and negligence. It is, I think, a grave injustice to professional men to have a charge of this kind outstanding for so long. It is impossible to have a fair trial after all this time."

In my view, on a proper construction, the phrase in O. 15, r. 6 "In any case, not otherwise provided for", means a case in which, for example, rr. 2 and 5 are not applicable; and it is clearly so here. It is observed that the sanctions under rr. 2 and 6 differ. Under the former it is draconic, dismissal is imperative if cause is not shown to the satisfaction of the court. On the other hand, under r. 6 dismissal of the suit is not obligatory.

It is abundantly clear that there has been an inordinate delay on the part of the plaintiff in pursuing this suit. The adjournments have always been at his instance and for nearly five years since 1963 he did nothing about it. He had not even completed his payment of advocate's fees. It was suggested that he was not aware that Russell & Co. had ceased to exist in February, 1965. I have already made my observations on that aspect. Even if that were so, what was he doing between November, 1963 until just before the firm of Russell & Co. was taken over by another firm of advocates in February, 1965? No credible excuse is made out. The plaintiff has not even sworn to an affidavit. This inordinate delay is, in my opinion, inexcusable.

If I understand Mr Mboijana correctly, he also submitted that O. 15, r. 6 gives the court authority to dismiss a suit on its own motion, for that reason also the application is misconceived. As Mr Pandit has pointed out, the answer is to be found in O. 48, r. 1 which reads:

> "All applications to the court, save where otherwise expressly provided for under these Rules, shall be made by motion and shall be heard in open court."

For the foregoing reasons, the suit is dismissed against the second, third, and fourth defendants with costs.

Order accordingly.

For the plaintiff:
C Mboijana
Mboijana & Co, Kampala

For the second defendant:

SH Dalal
Dalal & Singh, Kampala

For the third defendant:
SV Pandit
SV Pandit, Kampala

For the fourth defendant:
MP Vyas
MP Vyas, Kampala

Re Ssesanga
[1969] 1 EA 345 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	10 March 1969
Case Number:	19/1968 (40/69)
Before:	Sheridan Ag CJ
Sourced by:	LawAfrica

[1] Advocate – Restoration to roll after striking off – Misconduct as officer of Court – Whether name to be restored – Advocates Ordinance (*Cap*. 258), *s*. 24 (*U*.).

Editor's Summary

The petitioner was struck off the roll of advocates in 1962 for swearing a false affidavit. A previous application for restoration had been rejected in 1965. Testimonials from the applicant's employer and from advocates and magistrates were produced.

Held – the court must be able to trust its officers, and since the petitioner's misconduct was committed as an officer of the court, the petition would be dismissed.

Petition dismissed.

Cases referred to in judgment:

(1) *In re Garbett* (1856), 139 E.R. 1425.

Judgment

Sheridan Ag CJ: This is a second application by chamber summons under s. 24 of the Advocates Ordinance (Cap. 258) for an order that the Registrar do replace on the Roll the name of Stanley Walusimbi Ssesanga, Advocate, whose name was removed from the Roll for professional misconduct by

the order of Bennett, J. dated May 3, 1962.

The original file has been lost, but I have been informed from the bar that the previous application was made before the same learned judge on April 28, 1965 and that it was unsuccessful. In the absence of the relevant papers I am left in the dark as to the reasons for its rejection.

Section 24 of the Act provides:

> "(1) The Chief Justice may, in his discretion, order the Registrar to replace on the Roll the name of any advocate whose name has been removed from the Roll for professional misconduct or may revoke any order made suspending an advocate's right to practise:
>
> Provided that –
>
> (*a*) unless new material facts have come to the Chief Justice's knowledge since the order for removal or suspension was made, no order shall be made under this section within two years of the order of removal or suspension; and
>
> (*b*) no order shall be made unless the Attorney-General is given an opportunity of being heard.
>
> (2) Any advocate whose name has been removed from the Roll or whose right to practise has been suspended may petition the Chief Justice to make an order under subsection (1) of this section."

The main ground for this renewed application is that new material facts

have now been brought to the court's knowledge since the order for removal, within the meaning of proviso (*a*) to s. 24 (1).

The documentary evidence reveals –

(1) That from 1962 to 1967 the petitioner was employed as assistant to the Town Clerk in the Mengo Municipal Council;

(2) that by Statutory Instrument No. 14 of 1968 the Mengo Municipal Council was absorbed in the Kampala City Council;

(3) that since February, 1968 the petitioner has been employed by the Kampala City Council in the Town Clerk's Department in the post of Legal Clerk and that his duties include –

(*a*) superintending the Legal Department's Library, including the personal Legal Libraries of individual officers in the Town Clerk's Department;

(*b*) supervising all Council's legal documents appertaining to land;

(*c*) superintending Council's Registry of Civil Cases;

(*d*) dealing with all sundry debtors of the Council, except appearing in court;

(*e*) dealing with cases of damage to Council's property;

(*f*) dealing with cases of defaulters in payment of rates; and rents in Council houses or shops or kiosks;

(*g*) hire purchase agreements with Council's staff;

(*h*) contracts of service of staff of the Council;

(*i*) generally explaining to inquirers the legal position and the legal application of the Council's Bye-laws;

(*j*) and generally dealing with all matters that may be assigned to him by the Council's Senior Legal Officer.

The petition is accompanied by a testimonial from his present employers dated October 17, 1968 showing that they are satisfied with his conduct and work. There are other general testimonials from members of the bar and magistrates.

The earlier history of the matter may be gleaned from the petition, dated April 23, 1965, on the first application for an order for replacement. It reads:

"1. That your Petitioner was enrolled as an Advocate of This Honourable Court on the 23rd February 1955, and took out practising certificate on the same day.

2. That your Petitioner had renewed his practising certificate regularly and practised in Kampala from the said 23rd February, 1955 to April, 1962.

3. That on the application of the Honourable The Attorney General Uganda, in the Civil Registry Miscellaneous Cause No. 20 of 1961 the Honour (sic) Mr Justice Bennett considered and found the following allegations proved:

(*a*) That on 29th December, 1960 at Kampala whilst engaged as an Advocate by Adamu Musoke, your Petitioner swore an affidavit that he had been approached on 6th December 1960 to act for the said Adamu Musoke, which sworn statement was false and misleading to his knowledge and that he thereby acted improperly in the discharge of his professional duty (contrary to section 37 (i) (1) of the Advocates Ordinance, 1956).

(*b*) That on 21st March 1961 at the District Court Jinja, whilst engaged as an Advocate to defend

George William Kafuko in District Criminal Case No. 165 of 1961, your Petitioner was under the influence of drink or a drug to such an extent as to be unfit to conduct the accused person's defence, and that he thereby acted improperly in the discharge

of his professional duty (contrary to section 37 (i) (1) of the Advocates Ordinance, 1956).

(*c*) That on 12th April 1961 at the District Court Kampala whilst engaged as an Advocate to defend Emmanuel Kyebande in District Court Criminal Case No. 1052 of 1961, your Petitioner attempted to deceive the court by alleging that the prosecutor had told him he was calling fresh evidence which allegation he knew to be false, and that he thereby acted improperly in the discharge of his professional duty (contrary to section 37 (i) (1) of Advocates Ordinance 1956).

4. Your Petitioner was admonished in respect of allegation (*c*) above mentioned and his right to practise as an Advocate was suspended for twelve months with effect from 24th April 1962, in respect of allegation (*b*) above mentioned by the Honourable Mr Justice Bennett.

5. As for allegation (*a*) above-mentioned your Petitioner's name was ordered to be removed from the Roll of Advocates on the 3rd May 1962 by the Honourable Mr Justice Bennett, he having found the allegation proved. Copy of the learned Judge's decision on the allegation together with his Order is attached hereto and marked 'A'."

In concluding his decision on the first allegation Bennett, J. said:

> "In my judgment, Ssesanga's affidavit of December 29, 1960 was a calculated attempt to deceive the court. I find this allegation of misconduct has been proved beyond reasonable doubt.
>
> *Order*. So grave an act of misconduct cannot be adequately dealt with merely by suspending Ssesanga's right to practise. I consider him to be utterly unfitted to practise at the Uganda Bar. I order his name to be removed from the Roll. I also order him to pay the costs of the inquiry into this allegation.
>
> K. G. Bennett
>
> Judge
>
> 3.5.62."

Paragraph 3 (*c*) of the petition shows that the deception of the court was not an isolated incident. It occurred on at least two occasions.

Mr Gaiger for the Attorney-General, in opposing this application, submits that the testimonials only reveal that the petitioner has been a very good clerk. They do not show that, if he is restored to the Roll, he will not deceive the court again.

The principles governing applications for replacement or restoration are set out in Corderey on Solicitors, 5th Edn., p. 455:

> "Under the old practice, where the applicant's name had been struck off the roll for misconduct, the grounds for that order should be disclosed on the application for restoration and they alone might be sufficient to cause the application to be rejected although the applicant's subsequent conduct was blameless. If the applicant's name was struck off the roll for misappropriation of client's money his application would fail unless he had done all he could to make restitution. The evidence in support of an application under the present practice should, therefore, state the grounds of the original order, should show subsequent good conduct, and, if necessary, deal with all efforts to make restitution.
>
> Striking off the roll does not in all cases constitute a perpetual disability; sometimes it is meant only as a punishment and may be considered in the nature of a suspension from practice, and even when originally based on a criminal conviction it is not necessarily final. For example, the name of a

> solicitor convicted of a misdemeanour under the Bankruptcy Act and struck off the roll in 1869, was (on his fourth application) restored in 1882; that of a solicitor convicted of obtaining a small sum by false pretences and struck off in 1879, was (on his third application) restored in 1891; and that of a solicitor struck off in 1842, having retained a balance of his client's moneys on incorrect accounts, but who had repaid the money, was restored in 1852.
>
> Restoration was refused where the applicant had been convicted of seditious practices but pardoned; where he had been convicted of a conspiracy to extort money by means of disgusting libels; and where he had been guilty of distinct offences of forgery and perjury.
>
> On an application for restoration the court did not review the order striking the name off the roll, but assumed that it was properly made; yet it looked into the circumstances under which the solicitor's conviction took place."

Although the petitioner did not by his misconduct acquire any illgotten gains, I think that this case is analogous to *In re Garbett*, [1939] All E.R. 1425. There in 1849 an attorney was struck off the roll for perjury in an affidavit. The court refused in 1856 to readmit him to the roll, although he produced very strong affidavits and testimonials as to his conduct since 1849.

In a concurring judgment Williams, J. said at pp. 1429, 1430:

> "I am entirely of the same opinion. We are asked to readmit as an attorney on the roll of this court, a person who it is conceded was deservedly removed from it for one of the greatest offences of which as an officer of the court he could be guilty . . .
>
> I, therefore, agree with my Lord in thinking that we should be guilty of a very gross dereliction of duty, if, by replacing this man on the roll of attorneys, we were to put him in a position to exercise his talents, to the possible detriment of the public."

It must be emphasized that the petitioner's misconduct was committed as an officer of the court. If the courts are not able to trust such officers the system of the administration of justice is in danger of breaking down.

Mr Dave, for the petitioner, states that, if he is restored, the petitioner is prepared to give an undertaking to serve with the Kampala City Council or some Senior Advocate for a period of not less than twelve months, but on my reading of s. 24 of the Act such an undertaking would be unenforceable. Nor would the Registrar have a discretion in issuing him with a practising certificate under s. 9 of the Act.

I do not see why the petitioner cannot carry out his present duties without being replaced on the Roll.

Although it is nearly seven years since he was removed from the Roll I do not think that, in the exercise of my discretion, and for the reasons given above, he should now be replaced on it. The petition is dismissed.

Petition dismissed.

For the petitioner:
RS Dave
Patel & Dave, Kampala

For the Attorney-General:
MCW Gaiger (Principal State Attorney, Uganda)

Tsikalata v Republic
[1969] 1 EA 349 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	13 February 1969
Case Number:	1105/1968 (41/69)
Before:	Mwendwa CJ and Wicks J
Sourced by:	LawAfrica

[1] Criminal law – Negligence – Whether release of carbon dioxide as part of a fire practice constituted a negligent act causing harm – Penal Code, s. 244 (*K.*).

Editor's Summary

On August 15, 1967 at Nairobi Airport, the appellant took part in a fire extinguishing practice. Subsequently he was charged under s. 244 of the Penal Code for causing harm by "other negligent acts". Four of the five men entered a drill tower in which there was a drum containing a fire. It was alleged that the accused had in his charge a 50 lb. cylinder of carbon dioxide gas, and one of the five men (Okello) entered the drill tower holding the nozzle of a pipe connected to the cylinder. The carbon dioxide was released while the firemen were in the tower. Okello was taken out of the tower unconscious and he subsequently died. Section 244 of the Penal Code reads: "Any person who unlawfully does any act or omits to do any act which it is his duty to do, not being an act or omission specified in section 243 of this Code, by which act or omission harm is caused to any person is guilty of a misdemeanour and is liable. . . ." The particulars of the charge alleged that the accused had a quantity of carbon dioxide under his charge and failed to exercise care and precaution in its use which was dangerous with the result that harm was caused to the deceased, Okello. On appeal the evidence was extensively reviewed and the court found:

(i) it was not proved that pure carbon dioxide was ever used;

(ii) the use of the drill tower for practice, assuming normal carbon dioxide was used, was an essential part of the training of the firemen, but such practice was a reasonably safe procedure; and there was no failure to exercise reasonable care over the release of the gas.

Appeal allowed.

Conviction quashed and sentence set aside.

No cases referred to in judgment

Judgment

Mwendwa CJ: read the following judgment of the Court: The appellant was convicted by the magistrate

on one charge of omitting to do an act it is one's duty to do, not being an omission specified in s. 243 of the Penal Code, contrary to s. 244 of the Penal Code; and was sentenced to serve a term of imprisonment of three months. He appeals against his conviction and sentence.

On August 15, 1967 the appellant was a Fire Officer Grade II, and Officer in Command of the Training School attached to the Fire Station at Embakasi Airport, Nairobi. Courses for trained firemen, coming from various Airport Fire Fighting Stations in East Africa, were held and on that day the appellant carried out "a CO_2 practice". A drill tower was used in which there was a drum containing a fire. One man was on a fire tender in charge of a 50 lb. cylinder of carbon dioxide gas and four men approached the tower, one holding

a pipe with a nozzle connected to the cylinder. As the four men entered the tower through an aperture the gas was released from the cylinder. Three men managed to get out of the tower and were revived with the assistance of oxygen but the fourth, Stephen Okello, who had held the pipe, was taken out of the tower unconscious and, it proving impossible to revive him, he died. This outline of the facts is not in dispute.

The particulars of the offence were:

> "Lawrence Mbaitsi Tsikalata, on the 15th day of August, 1967, at Nairobi Airport in the Nairobi Area, having in his charge and under his control a quantity of carbon dioxide, in the absence of care or precaution in the use of which the life of any person may be endangered, omitted to use reasonable care and take reasonable precautions to avoid such danger, by which omission harm was caused to Stephen Okello."

The issue was, did the appellant have in his charge and under his control a quantity of carbon dioxide? If so, in the absence of care or precaution in its use, would the life of any person be endangered? If so did the appellant omit to use reasonable care and take reasonable precautions to avoid such danger? If so was the result of such omission that harm was caused to Stephen Okello?

The grounds of appeal were:

> "1. The prosecution failed to prove beyond reasonable doubt that the gas in the cylinder was in fact carbon dioxide gas, as alleged in the charge, and as a consequence the Appellant should never have been put in his defence by the learned magistrate.
>
> 2. The learned magistrate erred in fact and law when he found that the appellant did not exercise proper care for the safety of the firemen (which included the deceased) when he ordered a practice in the drill tower if the gas to be used was in fact carbon dioxide gas.
>
> 3. The learned magistrate erred in fact and law when he held that the appellant's acts or omissions which resulted in hastening the death of the deceased were wrongful and that the appellant was liable for the consequences of his acts or omissions irrespective of the state of health of the deceased.
>
> 4. The learned magistrate failed to consider adequately the training instructions and literature made available to the appellant on the properties of carbon dioxide gas which on the whole indicated that the said gas was not dangerous and which in turn governed the state of mind of the appellant in relation to acts or omissions by him in the circumstances.
>
> 5. That in all the circumstances of the case the sentence of three months imprisonment imposed without option of a fine was manifestly excessive."

It is seen that grounds 1 to 4 relate in order to the elements in the particulars of offence.

We propose to consider the second and fourth grounds of appeal, which are related, first and for this purpose only we assume that the gas in the cylinder was carbon dioxide, an issue which we will refer to when the first ground of appeal is considered.

In opening the case for the State Mr Graham, State Counsel, said that Mr Muraguri, the Government Chemist, would say that the rate of discharge found in an experiment with a similar cylinder used by the appellant was that after three seconds the space in which the men were working would be so saturated as to choke the men with gas and, in view of this fact the appellant was virtually condemning the four men to instant death. Mr Muraguri in his evidence fully

supported this assertion. He had seen the fire tower and based his opinion on the use of the gas in that tower even if the nozzle of the hose was directed into the drum containing a fire. Referring to a passage in the N.F.P.A. Handbook of Fire Protection, 10th Edn., at p. 735 which reads "Although the toxicity of carbon dioxide is practically negligible, it may cause suffocation of persons exposed to high concentrations for extended periods of time", Mr Muraguri replied that it was a purely medical issue and that his previous estimate was based on what he had read on medical aspects. Dr A. L. Ribeiro, the Police Pathologist, in his evidence, fully supported the opinion of Mr Muraguri and asked to comment on the passage from the N.F.P.A. Handbook which we have set out above, replied that he did not agree with it. The evidence of Dr C. S. Dave, an anaesthetist who is familiar with carbon dioxide as used in clinical practice, supported that of Mr Muraguri and Dr Ribeiro, he also being of opinion that in an atmosphere containing more than 7 per cent of carbon dioxide a person becomes confused, and at more than 30 per cent unconsciousness results. The evidence of Mr J. N. Akatsa, the Chief Fire Service Officer for Kenya, who was a witness for the prosecution, was that he had seen the drill tower in which the accident had occurred and he had been personally involved in practices in it when all types of media including carbon dioxide had been used and on several occasions 50 lb. gas cylinders of carbon dioxide had been released into the tower in training exercises, and he himself had been inside the tower when 50 lb. of carbon dioxide had been released in it, and the only bad effects he had experienced was some sneezing. Mr Akatsa explained that the technique was to get in, put out the fire, and get out as quickly as possible, the breathing technique being to hold your breath and if you have to breathe not to breathe deeply; and that firemen attending such a course must be aware of such techniques from earlier courses and experience. Mr Akatsa also explained that there were two fire services, one domestic and the other limited to airports, and he was head of the latter service. That his service was an emergency one, that carbon dioxide was a recognized fire fighting medium and in accordance with the rules of the International Civil Aviation Organization a stock of carbon dioxide must be held at the Airport Fire Fighting Services, and if it was decided not to stock carbon dioxide at Embakasi Airport the I.C.A.O. would downgrade the airport and certain types of aircraft would not land there. Further, that because of the accident, his service was not prepared to alter the training procedure and 50 lb. of carbon dioxide would continue to be released in the tower during exercises. In his evidence the appellant said that carbon dioxide was not a good medium to use in the open for the reason that oxygen quickly displaces the carbon dioxide and there is a danger of re-flash, that carbon dioxide was used in confined spaces such as the cockpit of an aircraft; the result was no useful purpose would be served by conducting fire practice with carbon dioxide in the open and a fire tower was necessary to simulate the conditions firemen were likely to meet in operation. The evidence of Mr J. S. Namuyo, Deputy Chief Fire Service Officer at Embakasi Airport, who gave evidence for the defence, was that he was familiar with the drill tower in which the accident happened, that it had been built in 1961, and in that year he had carried out a practice in it with carbon dioxide. In his opinion it was safe to squirt carbon dioxide into it when men were inside and today he would authorize the release of 50 lb. carbon dioxide into it with men inside. Both this witness and Mr J. N. Akatsa said that gas masks were not supplied, nor would they use them as they would impede rescue work which was their primary purpose. As we understand this evidence, the evidence of the appellant and of the firemen who gave evidence, the position is this: the function of an Airport Fire Fighting Service is that, possessing equipment, complying with the rules of the International Civil Aviation Organization, and being manned by trained firemen, the service be available to deal with crashed aircraft and other fire

hazards at airports. Foam is used if there is a fuel fire in the open or externally on an aircraft, but if the fire is inside an aircraft, for instance in the cockpit, carbon dioxide gas is used, and airport fire tenders are equipped with two 50 lb. cylinders of carbon dioxide gas to be used for the purpose. It is obvious that to attempt to extricate the crew and passengers from crashed aircraft, whether it be on fire or not, is a hazardous undertaking, the firemen being called upon to exercise considerable skill, and the work involves putting themselves into positions of great danger. It seems to us to be equally obvious that firemen employed in such an undertaking, both in the interests of minimizing danger to their own persons and so that they can perform their duties with the maximum efficiency, should be properly trained, and that the training should as nearly as possible simulate the conditions they are likely to be faced with in dealing with a crashed aircraft. The evidence of Mr Akatsa and Mr Namuyo appeared to us to establish that the use of the drill tower at Embakasi Airport for practice, using 50 lb. containers of carbon dioxide, was a necessary part of the training of firemen engaged on Airport Fire Fighting Services.

In his judgment the magistrate accepted the evidence of Mr Muraguri, Dr Ribeiro and Dr Dave, and found that the appellant "did not exercise proper care for the safety of the firemen when he ordered the practice". That is, as we understand it, the magistrate found that the fire tower was dangerous per se and the appellant's use of it, employing carbon dioxide gas, was such a failure of care, or the exercise of precaution, as to endanger the life of the firemen. Subject to the issue relating to the identity of the gas in the cylinders, this finding alone would have been sufficient to justify the conviction of the appellant. The magistrate continued in his judgment and referring to the evidence of Mr Akatsa said that these fire officers

> "have come out in support of their colleague, the accused, and have stated that they do not think that it is dangerous to use CO_2 from a 50 lb. gas cylinder for practice in that drill tower. It is, however, obvious from their evidence that they regard this gas in large quantities as dangerous, and have stressed that the firemen taking part with this gas in an enclosed area either should not breathe or breathe as little as possible. However, they went on to say that they would authorize similar practices with CO_2 to be held again. I hope not. We have witnessed the tragic consequences of one practice, and I shudder to think that with this knowledge and in the face of the definite opinion of Mr Muraguri and Dr Dave these Senior Officers at the airport fire service should be so determined to authorize the holding of such practices in that small drill tower with 50 lb. gas cylinders whose outflow of gas is uncontrollable."

With respect to the magistrate's reasoning we consider that his approach was wrong. Mr Akatsa was called as a witness for the prosecution and in his evidence he gave an outline of the functions of an Airport Fire Fighting Service, he indicated the nature of the experience and training necessary to qualify firemen to be a part of that service, and he referred to the need to possess certain equipment so that certain types of aircraft be allowed to use his Airport. Mr Akatsa is the Airport's Chief Fire Service Officer for Kenya and as such he should have been accepted as an expert witness. The evidence of the appellant, of Mr Namuyo (who also should have been accepted as an expert witness) and of firemen whose evidence relating to the use of equipment of Airport Fire Fighting Services and the training of firemen, was consistent with that of Mr Akatsa and should have been given equal weight. If such evidence is questioned it should be done in the way that the evidence of an expert witness is examined, for instance Mr Akatsa's evidence was that the drill tower was an efficient one. That statement could be attacked by identifying drill towers at other airports,

indicating differences and either obtaining admissions from Mr Akatsa that, compared to those other drill towers, the drill tower at Embakasi Airport was defective in points of design or construction so as to render it dangerous, or by obtaining that evidence from another expert witness. The evidence of expert witnesses cannot properly be dismissed by saying they are colleagues of an accused and as such their evidence has no weight. The evidence of Mr Muraguri as Government Chemist commanded great respect, as did that of Dr Ribeiro as Police Pathologist, and Dr Dave as anaesthetist, and they could properly be accepted as expert witnesses within their spheres of practice, but in this case none of them professed to have any experience in the equipment employed in Airport Fire Fighting Services, of its use or of the training of firemen, or of the equipment used in such training, with the result that their evidence relating to these matters was of little or no value. On the second and fourth grounds of appeal we are forced to the conclusion that the finding of the magistrate was against the weight of the evidence, the preponderance of the evidence being that the appellant did exercise proper care for the safety of the firemen, one of whom lost his life, when he ordered and carried out a practice in the drill tower at Embakasi Airport, if the medium used was 50 lb. of carbon dioxide.

The third ground of appeal refers to a part of the magistrate's judgment, where, having made the observations regarding the use of carbon dioxide in the drill tower which we have set out above, the magistrate continued that a more serious aspect of this unfortunate incident was the allegations of those firemen who took part in that fire practice that the appellant and two other firemen with him obstructed the firemen inside the drill tower in their efforts to get out of it. The magistrate considered the evidence of the firemen and found that the men inside the drill tower were pushed back. As we have said the practice involved four men entering the drill tower one of them holding a pipe to which was affixed a nozzle. It is necessary for us to refer to the evidence of these men. It is common ground that the four men entered the drill tower. The evidence of Mr M. J. Mauta was that he felt he was dying and tried to escape through the window when he was twice pushed back by the appellant who said "extinguish the fire". The evidence of Mr Lubembe supported the evidence of Mr Mauta. The evidence of the third man, Mr D. Mwamsanga, was quite different, he saying:

> "We tried to get out. We were told: 'Go back, put out the fire.' The accused said that. I do not know how I got out. I passed out."

Commenting on this evidence in his judgment the magistrate said:

> "One of them, Mr Mauta, stated that he tried to get out twice and twice he was pushed back and he then lost consciousness. Another of them Mr Lubembe said that he was behind Mr Mohamed Juma, and that Mohamed Juma was pushed back twice by the accused and the other two with him so that nobody could get out. He also became unconscious then. The same thing is repeated by the third fireman Mr Mwamusanga."

That Mr Mwamusanga said the same as Mr Mauta and Mr Lubembe is clearly a misdirection. In his evidence the appellant having referred to the instructions he had given said:

> "What I saw was that as soon as they stood up and the noise came there was panic in the room. I saw the deceased spreading the gas on the walls and I asked him to direct the gas into the bin. I did so twice, and when I did not see him responding and realized they had failed in their object of putting out the fire I asked them to come out."

The appellant denied that he had pushed the man back. A Mr W. Majori

released the gas from the cylinder and his evidence supported that of Mr Mauta and Mr Lubembe. Of the persons named as assisting the appellant to push the men back, Mr A. Nuguna denied that he had done so and said that as soon as the men in the tower started jumping up he helped to pull them out, and the other, Mr N. Maingi, denied that he took part in the practice and said that he was watching the drill and stood about five yards from the tower, that he and about seven others went to help the men in the tower.

There can be little doubt that the accident was unexpected. Mr Majori, who released the gas, said it took about forty seconds for the cylinder to empty and the men had been removed from the tower before the cylinder was empty. That is, the incident was over within forty seconds. There is no reason to doubt the appellant's evidence that the deceased did "lose his head" possibly as a result of the gas commencing to come out of the nozzle with a noise like that of a gun and he did spray the gas around the walls instead of into the bin containing the fire. During the very short period of an unexpected accident witnesses can be mistaken. In this case the drill tower was full of smoke from the fire and the white colour of the carbon dioxide and it is difficult to believe that Mr Lubembe, being behind Mr Mauta, could see what was happening at the window. We consider it to be unlikely, the gas being turned on with a loud report, the appellant giving directions to the firemen in the tower, it being realized there was an emergency, three firemen being pulled out of the tower and then two men climbing into the tower and the deceased being brought out, and all of this complete within forty seconds, that there would have been sufficient time for the men in the tower to try to get out, for the appellant to push them back, and for this to happen a second time. Evidence must be considered as a whole. The resolution of the issue whether or not the appellant did push the firemen back into the drill tower rested on an assessment of the credibility of the witnesses and in assessing this it would be proper for the magistrate to take into consideration his finding that the appellant conducted a practice with carbon dioxide in the drill tower which was conduct dangerous to life in itself. We are unable to say that the magistrate would have come to the same conclusion on the assessment of the credibility of the witnesses had he properly instructed himself that the carrying out of the exercise in that drill tower using 50 lb. of carbon dioxide was, under the circumstances of a training course of firemen employed in Airport Fire Fighting Services, a reasonably safe procedure and that he had not misdirected himself on the evidence of Mr Mwamusanga; and we find that there is a doubt that the appellant did push the men back into the tower and he must have the advantage of it.

We must now refer to the first ground of appeal and that is that the prosecution failed to prove that the gas in the cylinder was in fact carbon dioxide. It was a fundamental element in the case for the prosecution that the gas used in the exercise was carbon dioxide, and it was an absence of precaution in the use of that gas which resulted in the harm. It follows that the onus rested on the prosecution to prove that the gas in the cylinder was in fact carbon dioxide. The accident occurred on October 15, 1967. The cylinder used in the exercise was taken into the possession of Chief Inspector Flogdell on the following day, October 16, and his evidence was that on the same day he handed it to Mr D'Costa of the Government Chemist's department. At the end of the case for the prosecution Mr Graham said he would have to call C.I. Flogdell to produce the gas cylinder and the horn as exhibits. It then appeared that the cylinder has been lost and that no report existed relating to the nature of its contents. This was on July 22, 1968, over nine months after the accident. There was a mass of evidence relating to the contents of the cylinder, the principal factor in favour of it being carbon dioxide being that in practice flow of that gas from a cylinder is not regulated and, on it being released, it emerges emitting

a noise like the discharge of a gun, and the discharge is so rapid that a 50 lb. cylinder is exhausted in about forty seconds and this occurred at the time of the accident. In his judgment the magistrate found that the cylinder did contain carbon dioxide and we are inclined to agree with that finding. It seems that the cylinder used in the practice was one of two cylinders secured to a fire tender that had come from Mombasa. The other cylinder was released to Mr Muraguri who carried out an experiment with it and it was produced in evidence. It is not disputed that this cylinder was painted a different colour, and was different in construction, to the one used in the incident. The evidence of Mr F. R. Corner, Branch Manager of E. A. Oxygen Ltd., was that under the British Standard Specification for the Identification of Gas Cylinders, black (which was the colour of the cylinder used in the incident) indicated either industrial oxygen or industrial carbon dioxide in a temperate climate and that if he received an entirely black cylinder with no markings on it he would refer to the valve to ascertain if it was a male or female thread, he would then check the cylinder numbers and with this information he would be able to decide if the contents were oxygen or carbon dioxide. This evidence did not take the matter much further. Other evidence was that carbon dioxide is one and a half times the weight of air with the result that some gas must have been left in the cylinder and this could have been subject to analysis. It is pure speculation as to the contents of the cylinders in the absence of evidence of an analysis of the residue left in it. It is not for this court to speculate but we are constrained to indicate a gap of a very serious nature in the case for the prosecution which follows from the absence of positive evidence of the nature of the contents of the cylinder and it is this. It is a reasonable presumption that the walls of the cylinders are opaque and it is a reasonable presumption that the cylinders are re-used. There was no evidence relating to the system of storing of cylinders between emptying and filling, of how long they remain empty before re-filling; there was no evidence whether or not the cylinders are cleaned before they are refilled. Lawyers the world over are familiar with the case of *Donoghue v. Stevenson*, the snail in the bottle case. Snails do crawl through openings into opaque bottles, small animals and insects can crawl in and die there, dust can settle, a cylinder can be used for storing other solids, liquid or gases and part left in. It is common knowledge that, with all the precautions taken with a blood bank, there is still a percentage of error and in a recent case, a patient having died during the course of a transfusion, it was found that the bottle contained paraffin. With a complete absence of knowledge of the precautions, if any, taken with cylinders awaiting filling with carbon dioxide gas it seems to us impossible to say, in the absence of evidence relating to the nature of the residue, that the gas in the cylinder used in the practice did not contain an additional substance which could have caused the accident. At the trial much was made of the medical condition of the deceased, that he was suffering from sclerosis of the liver, a condition which made him susceptible to carbon dioxide gas. However the other three men in the tower became unconscious, with the result that it is almost certain that a common factor was the cause. On the evidence it must be assumed that the fire tower was safe to be used for fire fighting practice using 50 lb. cylinders of carbon dioxide. No other factor has been suggested, nor can we envisage any other factor, with the result that there is a strong indication that either the gas in that cylinder was not carbon dioxide, or if it was there was also present a contaminant which was the cause of the accident. We are again forced to a conclusion and that is, in the absence of evidence of the content of the cylinders used in the practice, there was no evidence that the gas in the cylinder was the normal carbon dioxide gas used in fire fighting and no more.

We have been constrained to examine the facts of this case in some detail and one reason we have done so is firstly that, the gravamen of the magistrate’s

judgment being that use by Airport Fire Fighting Service of 50 lb. cylinders of carbon dioxide for fire fighting and in practice in fire towers amounting in itself to an absence of care and precaution, and the use of it endangering the life of firemen, and secondly, the implementation of the recommendation by the magistrate in his judgment that carbon dioxide gas be not used, would result in Embakasi Airport ceasing to be an Airport of international standing.

It seems that the drill tower at Embakasi Airport was built in 1961 from a rough sketch supplied by a Mr Grenville Jones, who was then Airport Chief Fire Service Officer for Kenya. Although there was ample evidence that the fire tower follows an effective design and has been properly constructed, in view of the fact that there was no comparative evidence before the magistrate, we consider that it would be prudent that its design and construction should be subject to a comparative check, if that has not already been done.

For the reasons we have given the appeal must be allowed.

The conviction is quashed and the sentence set aside.

Appeal allowed.

For the appellant:
BN Georgiadis
B Georgiadis, Nairobi

For the respondent:
JR Hobbs (Deputy Public Prosecutor, Kenya)
Attorney-General, Kenya

Republic v El Mann
[1969] 1 EA 357 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	26 September 1968
Case Number:	1/1968 (42/69)
Before:	Mwendwa CJ, Farrell and Chanan Singh JJ
Sourced by:	LawAfrica

[1] Constitutional Law – Fundamental Rights – Protection against self-incrimination – Whether extends to render inadmissible in evidence against accused charged with Exchange Control offence information given by accused before trial in answer to mandatory questionnaire – Constitution of Kenya, s. 27 (1)*; Exchange Control Act* (*Cap.* 113) *Sched.* 5, *Part I, para.* 1 (1) *and* (5) *as amended by Exchange Control* (*Amendment*) *Act* 1968, *s.* 5 (*K.*).

[2] Constitutional Law – Interpretation – Of Constitution – What principles to be applied (*K.*).

[3] Constitutional Law – Statute – Validity of – Whether Exchange Control Act (*Cap.* 113), *Sched.* 5, *Part I, para.* 1 (5) *ultra vires Constitution* (*K.*).

[4] Evidence – Admissibility – Exchange Control – Whether answers given by accused to mandatory questionnaire are admissible in evidence against him – Exchange Control Act (*Cap.* 113), *Sched.* 5, *Part I, para.* 1 (5) (*K.*).

[5] Statute – Construction – Liberal or strict – Which interpretation to be given to Constitution of Kenya, s. 27 (1) (*K.*).

Editor's Summary

This reference was made to the High Court under 28 (3) of the Constitution of Kenya by the Senior Resident Magistrate, Nairobi. The point for decision was whether the Republic might put in evidence against an accused charged with a contravention of the Exchange Control Act answers given by the accused to an investigation officer pursuant to a mandatory questionnaire under powers conferred by para. 1 (1) of the General Provisions as to Evidence and Enforcement set out in Part I of the Fifth Schedule to the Act. By a recent amendment to the Fifth Schedule, Part I, para. 1 (5) it was expressly enacted that any information obtained as a result of the questionnaire should be admissible in evidence in any prosecution for an offence under the Act. In support of refusing the admission of the information as evidence, counsel for the accused contended that the fundamental right under the Constitution of Kenya, s. 21 (7), namely, "No person who is tried for a criminal offence shall be compelled to give evidence at his trial", rendered the amended sub-paragraph ultra vires the Constitution.

Held –

(i) there was no ambiguity in the wording of s. 21 (7) of the Constitution, which should therefore be construed according to the ordinary and natural sense of the words used and did not protect the accused from the giving of evidence by the prosecution of information provided by the accused before the trial began;

(ii) para. 1 (5) of Part I of the Fifth Schedule to the Exchange Control Act is not ultra vires the Constitution;

(iii) the information was admissible in evidence against the accused.

Case remitted back to the subordinate court to be disposed of accordingly.

Cases referred to in judgment:

(1) *Barnes v. Jarvis*, [1953] 1 W.L.R. 649.

(2) *Direct United States Cable Co. v. The Anglo-American Telegraph Co.* (1877), 2 A.C. 394.

(3) *Warburton v. Loveland* (1832), 5 E.R. 499.

(4) *Keshava Menon v. State of Bombay*, [1951] S.C.R. 228.

Judgment

Mwendwa CJ: read the following judgment of the Court: This is a reference to the High Court under the provisions of sub-s. (3) of s. 28 of the Constitution, which reads as follows:

> "If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of section 14 to 27 (inclusive) of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."

The proceedings out of which the reference arises are a criminal prosecution before the Senior Resident Magistrate, Nairobi, in which the accused is charged with a contravention of the Exchange Control Act (Cap. 113 of the Revised Laws of Kenya, 1962). In those proceedings the Republic sought to put in evidence certain answers given by the accused to the Principal Investigation Officer of the Exchange Control Investigating Section pursuant to directions given by that officer under powers conferred by sub-para. (1) of para. 1 of the General Provisions as to Evidence and Enforcement set out in Part I of the Fifth Schedule to the Act. The Exchange Control Act, which was enacted in 1950, was based on the corresponding legislation in force in the United Kingdom and a large number of other territories, and until recently there was no material difference between the provisions of Part I of the Fifth Schedule and the corresponding provisions in the English Act. But recently by the Exchange Control (Amendment) Act 1968 (No. 17 of 1968) certain changes have been made which constitute a departure from the English legislation. In particular by s. 5 of the Amending Act a new sub-paragraph has been added to para. 1 of Part I of Schedule 5 which so far as material reads as follows:

> "Any information obtained under this paragraph shall be admissible in evidence in any prosecution for an offence under this Act of any person from whom it was obtained . . ."

When the prosecution sought to put in the answers of the accused at the trial, his counsel objected to their admission in evidence on the ground that the new sub-paragraph, though duly enacted by Parliament, was unconstitutional as being in contravention of Chapter II of the Constitution which sets out the "fundamental rights and freedoms of the individual" and provides for their protection. The particular provision which (so it is contended) the new sub-paragraph infringes is to be found in s. 21 which sets out "provisions to secure protection of law", and is a single sentence which comprises the whole of sub-s. (7) of that section and reads as follows:

> "No person who is tried for a criminal offence shall be compelled to give evidence at his trial."

Upon the objection being raised the learned magistrate, at the request of State Counsel, quite properly adjourned the trial and referred the question to this Court in accordance with the provisions of s. 28 (3) of the Constitution. The exact terms of the question referred to us for our determination are whether sub-para. (5) of para. 1 of Part I of the Fifth Schedule to the Exchange Control

Act (Cap. 113) is ultra vires the Constitution of Kenya. The short point for our determination is whether s. 21 (7) of the Constitution is to be given a liberal and extended construction, as contended by Mr. A. R. Kapila, leading counsel for the accused who has appeared before us in support of this reference; or is to be construed literally and narrowly in accordance with the exact meaning of the words used, as contended by Mr. Potter, Q.C., who has presented to us the arguments on behalf of the State.

We wish to say at the outset that the case has been very fully and ably argued on both sides, and we are indebted to both counsel for the assistance they have given to the Court. If we do not refer in detail to the numerous authorities and decisions which have been brought to our notice, it is not because we have not considered them, but because we have reached a clear and definite conclusion based on what appears to us to be the clear words of the subsection and requiring little or no authority in its support.

Counsel on both sides are in substantial agreement as to the principles of construction to be applied and each of them has referred us to the same passage in Craies on Statute Law (6th Edn.), which appears at p. 66. The passage reads:

> "The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. 'The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject-matter with respect to which they are used and the object in view.' "

Pausing there, we note that the citation comes from the high authority of Lord Blackburn in *Direct United States Cable Co. v. The Anglo-American Telegraph Co.*, 2 A.C. 394, a case decided in 1877. The passage continues:

> "In *Barnes v. Jarvis*, [1953] 1 W.L.R. 649 Lord Goddard, C.J., said:
>
> > 'A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered.'
>
> If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver.
>
> > 'Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature.' "

The last sentence is a citation from Tindal, C.J., in *Warburton v. Loveland* (1832), 5 E.R. 499, a case decided in 1832, and reference is made in a footnote to a large number of subsequent cases in which the principle has been upheld.

We have quoted this passage in extenso, because both sides agree that it sets out the principles of construction which we have to apply. But, of course, each side lays different emphasis on different aspects of those principles. Counsel for the accused invites us to pay more attention to those passages which stress that regard must be had to the object of the legislation, counsel for the Republic on those which lay the principal emphasis on the language used. There is one point, however, in which, if we have correctly followed the submissions, we detect some difference of approach. It appears to us that counsel for the accused is inviting us to apply a more liberal construction to a constitution than we should adopt in relation to an ordinary enactment of the legislature, and he has cited some passages from Basu on the Constitution of India (5th Edn.,)

at p. 54 which appear to lend some support to this view. Counsel for the Republic, on the other hand, contends that the same canons of construction apply to a constitution as to any other enactment of the legislature. There are, we consider, dicta which appear to support either viewpoint. But we think that the issue is put into true perspective in the citation which appears on p. 55 of Basu, in which Das, J., in *Keshava Menon v. State of Bombay*, [1951] S.C.R. 228, a Bombay case, said:

> "An argument founded on what is claimed to be the spirit of the Constitution is always attractive for it has a powerful appeal to sentiment and emotion: but a court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view."

We respectfully adopt this dictum as setting out the correct approach to the interpretation of a constitution. We do not deny that in certain contexts a liberal interpretation may be called for, but in one cardinal respect we are satisfied that a constitution is to be construed in the same way as any other legislative enactment, and that is, where the words used are precise and unambiguous they are to be construed in their ordinary and natural sense. It is only where there is some inprecision or ambiguity in the language that any question arises whether a liberal or restricted interpretation should be put upon the words.

In the light of these considerations we now proceed to examine the subsection which we are called upon to construe. It is very short and we repeat it for ease of reference:

> "No person who is tried for a criminal offence shall be compelled to give evidence at his trial."

The person who is sought to be protected is a "person who is tried for a criminal offence": the protection afforded is that he shall not be compelled to give evidence: the time at which the protection is to operate is "at his trial". We ask ourselves where is any ambiguity to be found in this short and concise provision?

Nevertheless counsel for the accused has strenuously argued that the intention of the subsection is quite different from what may be gathered from its plain words. He contends that if the provision is narrowly and literally construed, the protection it affords is nugatory, and the guarantee is robbed of all meaning. The words, so he submits, enact a guarantee against self-incrimination. We pause to comment that, in making this submission at the outset of his argument, he appears to us, with respect, to have fallen into the error of first assuming the intention of the legislature and then seeking to spell out the language, by a strained interpretation, the meaning of which has been assumed. He has ranged widely over the constitutions of many countries in the world and has referred in particular to analogous provisions in the constitutions of America and India. In America it is well-established that the Fifth Amendment provides protection against self-incrimination which comes into effect long before the trial and extends not merely to evidence in court but to compulsory statements of a self-incriminating character. In India by art. 20 (3) of the Constitution protection of a similar kind is afforded although there has been some difference of opinion on the question at what stage the protection begins to operate. As we understood his argument counsel for the accused submits that the framers of the Kenya Constitution, having in mind, as they must have done, such far-reaching guarantees afforded by other constitutions, must have intended to provide some comparable protection in our constitution. We

have no hesitation in rejecting such a submission. We note that the language used in the provisions prayed in aid is quite different from the language of the subsection under consideration, and we base ourselves firmly on the cardinal principle to which we have referred that the intention of the enactment is to be gathered in the first place from the words used. Even if some intention were to be assumed from extrinsic considerations, we should, we think, have no more right to assume that the intention of the legislators was to incorporate guarantees as wide as or wider than those found in other constitutions than to assume that, being aware of practical difficulties which may have arisen from guarantees too widely framed, they intended to substitute some guarantee less far-reaching in its effects. We make neither assumption: we seek to construe what appear to us to be the plain words of the subsection and to give effect to them according to their tenor.

In support of his main submission counsel for the accused is driven to contend that the section, although it appears to refer to evidence given by an accused person at his trial, is intended to be construed as referring to statements made by the accused person before his trial, of which evidence is sought to be given by prosecution witnesses at his trial. We are satisfied that no such construction can be supported and that the words are incapable of the meaning for which counsel for the accused contends. We stress two points. First of all, the words "against himself" are conspicuously absent from the subsection, and in their absence the assumption that the provision is intended to be a general guarantee against self-incrimination can scarcely be supported. Secondly, the protection extends to evidence given at the trial. Even if it were open to argument that "to give evidence" means to provide evidence, the prohibition is limited to evidence provided at the trial, and cannot without doing violence to the plain language of the subsection be extended as counsel for the accused seeks to extend it, to evidence provided by the accused person before the trial began. If, on the other hand, the expression "to give evidence" is to be construed in its natural and obvious sense the prohibition expressly relates not to evidence by prosecution witnesses but to evidence given by the accused. To suggest that when an investigation officer puts in evidence an extrajudicial statement allegedly made by the accused, it is the accused who is giving evidence, is a proposition which we are wholly unable to accept.

Our task is to decide what on its proper construction the constitution provides, and it is no concern of ours to consider whether wider guarantees ought to be provided or to evaluate the protection which, properly construed, the constitution affords. But as the submission that the protection afforded by the subsection is of little or no value has been put forward as an argument against construing the subsection according to the natural and obvious meaning of the words, we think it right to add that we do not accept the view that the protection is of minimal importance. Counsel for the Republic has very appositely referred us to sub-s. (2) of s. 127 of the Evidence Act which provides that in criminal proceedings every person charged with an offence shall be a competent witness for the defence, but includes the proviso that

> "the person charged shall not be called as a witness except upon his own application".

This, we think, is exactly what s. 21 (7) of the Constitution in other language provides. Reference has been made by counsel on either side to the passages in Broom's Legal Maxims in which the Latin maxim "nemo tenetur seipsum accusare" is considered. At p. 630 of the 9th edition this is referred to as, in the words of Lord Coleridge, "a maxim of our law as settled, as important and as wise as almost any other in it", but the author goes on to note that in many instances, in particular in the laws of bankruptcy and in legislation designed to

protect the revenue, it has been entrenched upon. But the passage concludes (at p. 632) with the comment, “the maxim nemo tenetur seipsum accusare still holds good to this extent, that the person charged cannot be compelled to enter the witness-box against his will”. It is clear that neither the author nor the legislators who enacted the English Criminal Evidence Act of 1898 from which s. 127 of our Evidence Act is ultimately derived, regarded the protection afforded by the proviso as something of little account.

We have said enough to show that in our opinion sub-s. (7) of s. 21 of the Constitution means no more and no less than is to be gathered from the plain words of the provision, and is not to be given an extended meaning which cannot be spelt out of the words used without doing violence to the language of the subsection. The question which has been referred to us for our decision is whether sub-para. (5) of para. 1 of Part I of the Exchange Control Act is ultra vires the constitution of Kenya. For the reasons we have given our answer is in the negative. It follows that in accordance with sub-s. (4) of s. 28 and sub-s. (2) of s. 175 of the Constitution, the case will be remitted to the sub-ordinate court to be disposed of in accordance with our decision.

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AR Kapila & Co, Nairobi

For the prosecution:
KD Potter, *QC* (Special Legal and Constitutional Counsel, Kenya), *OP Nagpal* (Senior State Counsel, Kenya) and *HGD Graham* (State Counsel, Kenya)
Attorney-General, Kenya

Onyango v Republic
[1969] 1 EA 362 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	29 November 1968
Case Number:	810/1968 (43/69)
Before:	Mwendwa CJ and Farrell J
Sourced by:	LawAfrica

[1] Evidence – Expert – Opinion of handwriting expert – Whether magistrate may accept the opinion or must form his own opinion.

Editor’s Summary

On July 2, 1965, some salt was stolen from the Magadi Soda Company. The appellant was convicted of the theft of the salt, forgery of a log sheet and of fraudulent false accounting; and was sentenced to thirty

months imprisonment on each conviction, sentences to run concurrently. The appellant's convictions to a great extent depended upon the evidence of an accomplice (Yunis) who received and sold the salt. Corroboration was therefore essential. It was alleged that the appellant had written details of the transaction relating to the sale of the salt in a notebook in possession of Yunis. The trial magistrate accepted the opinion of a handwriting expert that the writing in the notebook was the writing of the appellant. On appeal against conviction it was contended (*inter alia*) that the trial magistrate was wrong to accept the opinion of the expert that the handwriting in the notebook was the same handwriting as the handwriting in other documents admittedly the handwriting of the appellant. It was contended that the magistrate should have formed his own opinion about the handwriting. The expert compared an airmail letter and some specimen handwriting, both admittedly in the appellant's handwriting, with the writing in the notebook. After a careful study he confidently concluded, giving his reasons in a report, that the writing in all three sets of documents was in the same hand.

Held – the magistrate was entitled to accept or reject the opinion of the expert.

Appeal dismissed.

Findings and sentences confirmed.

Cases referred to in judgment:

(1) *Hassan Salum v. R.*, [1964] E.A. 126.

(2) *Wakeford v. Lincoln* (*Bishop*) (1921), 90 L.J.P.C. 174; [1921] 1 A.C. 813.

(3) *R. v. Podmore* (1930), 46 T.L.R. 365.

Judgment

Mwendwa CJ: read the following judgment of the Court: On July 2, 1965, 100 bags of coarse salt were stolen from the Magadi Soda Company. A short time before that date the assistant station master at Magadi, George Wahome, had been posted to Kalimoni, near Karatina. As no quarter was immediately available for him, he left his personal effects in the quarter he had occupied at Magadi in the care of his mother, Yunis. Later he returned to Magadi to arrange for the transport of his goods, and for this purpose a railway truck was assigned to him. When the railway truck arrived at the station for loading it already contained the 100 bags of coarse salt which had been stolen. The goods belonging to George Wahome were loaded into the truck under the supervision of Yunis and Wahome's cousin, Samwel Kibera, since he himself had already left for Kalimoni. The household goods were unloaded at Kalimoni, and the truck was then routed onward to Karatina where the bags of salt were unloaded and eventually delivered to a purchaser.

When the theft was discovered, investigations were put in hand by the railway police, and in due course George Wahome and Yunis were jointly charged with theft. At their trial one of the principal witnesses for the prosecution was William Okumu, the appellant in the present proceedings, who at the material time was the assistant salt process manager at the Magadi Soda Company. The two accused were convicted of theft and sentenced to twelve months imprisonment. The appeal court substituted convictions for unlawful possession of stolen property, but the sentences were confirmed and duly served.

As soon as Yunis was released from prison she went to the police and, while not denying her part in the transaction, complained that the theft had been instigated by the appellant, and she produced her notebook which contained an entry allegedly in the handwriting of the appellant which, if genuine, went a long way towards establishing that the appellant was implicated in the offence. According to her story, there had been some discussion between herself and the appellant in regard to a deal concerning salt. Somebody in Nyeri wanted to purchase salt and the appellant was in a position to obtain it. The salt could be transported in the bogie taking George Wahome's personal effects to Kalimoni. The appellant would sell 100 bags of salt to Yunis at Shs. 15/- per bag and she would be able to sell it for Shs. 24/- per bag. Yunis agreed, but explained that she had only Shs. 140/- in ready cash, but could draw Shs. 400/- out of her account in the Post Office Savings Bank the next day. This she did and on the evening of July 3 she met the appellant again and gave him Shs. 540/- towards the purchase price. It was on this occasion that the appellant wrote down the details of the transaction in her notebook, the entry showing that out of a total of Shs. 1,500/-, Shs. 540/- had been paid and a balance of Shs. 960/- remained to be paid within one week.

The bogie allotted to George Wahome arrived at the station the same evening with the 100 bags of salt in it. After loading her son's possessions into it, Yunis and her nephew, Samwel Kibera, travelled with it part of the way. Yunis left the train at Athi River, then made her way to Kalimoni, where she saw the station master but not her son. Later she went to Karatina and was there when

the salt arrived. She had brought two letters with her, one from her son to the prospective purchaser of the salt and one to a person named Mathenge sent by one Maina. She delivered the letters and when the salt arrived Mathenge had it off-loaded and stored. Yunis was given about Shs. 2,000/- and returned to Magadi where she paid the appellant the balance of Shs. 960/-.

On the basis of the story told by Yunis, further investigations were set in train and the appellant was charged on three counts, the first alleging theft of the salt, the second forgery in respect of a document purporting to be a daily log sheet, and the third charging him with fraudulent false accounting. He was convicted on all three counts and sentenced to thirty months imprisonment on each count, the sentences to run concurrently. He now appeals against his convictions and sentences.

The learned magistrate in a lucid and forceful judgment has considered the evidence at length and set out her reasons for finding the appellant guilty. She has correctly appreciated that the allegations in the three counts are closely linked and that the alleged offences of forgery and false accounting, if established, were for no other purpose than to cover up the theft of the salt, the subject of the first count, and can properly be taken into account as circumstantial evidence in support of that count. In so far as the prosecution relied on direct evidence of the alleged conspiracy between the appellant and Yunis, she correctly directed herself that Yunis must be treated as an accomplice and that the court must look for corroboration of her evidence. Among the items of corroboration which she found established, the most important was the entry in the notebook, which Yunis claimed was written by the appellant in her presence, a fact which the appellant denied. This conflict she resolved in favour of the appellant, relying on the expert opinion of the document examiner who was satisfied that it was in the same handwriting as an airmail letter admitted to have been written by the appellant, and the specimens of his handwriting contained in Ex. 15. She found further corroboration in the evidence given by the station master at Kalimoni (which she accepted) that the appellant on a subsequent visit had told him roughly that “he and Wahome had done something at Magadi and now these matters were known. He said it was to do with 100 bags of salt”.

With regard to the charge of forgery, the allegation by the prosecution was, briefly, that a daily log sheet was ordinarily completed and signed by a clerk Nyikuli and contained, among other details, particulars of the salt packed and loaded and of the various bogies into which it had been loaded. It was admitted by the appellant that on July 2 he himself had completed the form in his own hand in the absence of the clerk. No mention is made of the bogie in which Wahome’s personal effects were loaded on that day, or of the 100 bags of salt which were found in the bogie at the time when it arrived at the station. The sheet purports to be signed by Nyikuli. The appellant claimed that he had asked Nyikuli to sign it on his return to the office. Nyikuli denied that it was his signature. The document examiner was of the opinion that the purported signature was a traced forgery. The learned magistrate believed Nyikuli and the document examiner and rejected the explanation of the appellant.

The omission to enter the particulars of the 100 bags of salt loaded into the bogie in question is the subject of the third count of fraudulent false accounting.

On the facts found by the magistrate, there was unquestionably a formidable case against the appellant based both on direct and circumstantial evidence, and on the basis of these facts it is difficult to see how the magistrate could have come to any other conclusion than that the case against the appellant had been established on all three counts. The question is whether the magistrate was justified in her findings of fact, and counsel for the appellant has strenuously

argued that, by reason of misdirections on certain parts of the evidence and the failure to take into account other matters adverse to the prosecution, the findings of fact should not be allowed to stand.

The first three grounds of appeal relate to the evidence of Yunis. It is conceded that the learned magistrate correctly directed herself that this witness was an accomplice and looked for corroboration, but it is submitted that of the various matters accepted as corroboration, those which were capable of amounting to corroboration had not been satisfactorily established, and other matters had been accepted as corroboration which were incapable of amounting to corroboration in law.

We have already referred to the diary entry, which is not only the principal item relied on as corroboration of Yunis, but may be regarded as the key document in the case. If it was properly accepted by the magistrate as being in the handwriting of the appellant, it seems to us that anything else urged against the complicity of the appellant in the theft must be of no avail. The finding is attacked on two grounds. First of all, the direct evidence of Mwailenge is that the document was written by the appellant in the presence of a number of people assembled together at the house of one, Mwaura. With one exception all the same people were present at three meetings between Yunis and the appellant, the first when the scheme was originally hatched, the second when the part payment was made, and the third when the final payment was made. Yet, of all these potential witnesses, only one was called by the prosecution, and that an admitted accomplice. Counsel for the appellant not only stresses the improbability of a plot being hatched in the presence of so many outsiders, but pertinently asks why none of these witnesses was called. In the case of the second meeting it is alleged that in addition to the other members of the group, John Mwailenge, the station master at Magadi, was present, and Yunis specifically mentioned that he was present when the appellant wrote the entry in the diary. John was called as a witness, and gave evidence at length as to the arrangements in relation to the allocation of trucks. But not a single question was put to him by the prosecution as to his presence at the meeting or as to the appellant having written in the book. This was a very serious omission, and counsel for the appellant is fully justified in suggesting that the magistrate, if the matter had been brought to her attention, ought to have drawn an inference adverse to the prosecution and presumed that if questioned the witness would have denied any knowledge of the occasion. The matter was not, in fact, brought to the attention of the magistrate by counsel for the defence, but we nevertheless think that the point should have been present to her mind, and for the purposes of this appeal we think it right to presume that if the station master had been asked the question he would have denied that he had been present or that, if present, he had seen the appellant write anything. We need not, however, go so far as to presume that he would positively have denied that the appellant wrote in the book.

The second attack on the finding that the appellant wrote the entry is directed to the manner in which the expert evidence was given. It is not challenged that Mr. Thompson, the document examiner, is an acknowledged expert in his field. But it is urged that he went far beyond the proper province of a handwriting expert in the opinion he expressed and that the magistrate, instead of accepting his opinion, should have formed her own conclusion as to the handwriting of the exhibit. It is further submitted that insufficient material for comparison was available, but we do not find any substance in this last point.

We will consider the evidence first. The witness was given an airmail letter and some pages of standard writing, admittedly in the handwriting of the appellant, and he compared this with the handwriting in the notebook. He says

that he made a comparison chart and took a great deal of time over it. He gave a confident opinion that the writing in the airmail letter, in the specimen sheets, and in the notebook were all in the same hand. He put in a written report to the same effect, but neither in his report nor in his evidence did he give any detailed reasons for his conclusion; nor was he asked in cross-examination to give his reasons.

In her judgment the magistrate dealt with the matter in this way. She said:

> "I accept the document examiner's evidence unreservedly. He is a person of great experience and it is for noting that when subjected to a very searching cross-examination by learned counsel for the defence as to whether his opinion might be mistaken, he said – 'I am certain in my own mind I am right. When I am uncertain I use the word "doubt".' On this evidence which corroborated Yunis Wangoi's story that she saw the accused make the entry in her notebook I am satisfied that it was the accused and none other who made that entry."

Counsel for the appellant submits that this was a wrong approach to the evidence and relies on the case of *Hassan Salum v. R.*, [1964] E.A. 126. In that case, Spry, J. (as he then was) in his judgment had this to say about the evidence of a handwriting expert:

> "At the hearing of the appeal, I was not referred to any authority on the weight to be given to such evidence and, indeed, there appears to be remarkably little. The only reported case which I have discovered which is of assistance in the present case is *Wakeford v. Lincoln* (*Bishop*) (1921), 90 L.J.P.C. 174 in which Lord Birkenhead observed:
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> > 'The expert called for the prosecution gave his evidence with great candour. "It is not possible," he says, "to say definitely that anybody wrote a particular thing. All you can do is to point out the similarities and draw conclusions from them." This is the manner in which expert evidence on matters of this kind ought to be presented to the court, who have to make up their minds, with such assistance as can be furnished to them by those who have made a study of such matters, whether a particular writing is to be assigned to a particular person.'
>
> I would refer also to a passage from the summing-up of Lord Hewart in the trial of William Hendy Podmore (I quote from the Famous Trials Series as the only source available to me), when he said:
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> > 'Let me say a word about handwriting experts. Let everyone be treated with proper respect, but the evidence of handwriting experts is sometimes rather misunderstood. A handwriting expert is not a person who tells you, this is the handwriting of such and such a man. He is a person who, habituated to the examination of handwriting, practised in the task of making minute examination of handwriting, directs the attention of others to things which he suggests are similarities. That, and no more than that, is his legitimate province.'
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> The summing-up received the express approval of the Court of Criminal Appeal in *R. v. Podmore* (1930), 46 T.L.R. 365:
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> > 'I would say at once that in my opinion the expert witness was at fault in two respects. In the first place, he merely referred generally to his methods but did not explain to the court the particular features of similarity or dissimilarity, so enabling the court to weigh their relative significance. Consequently, his evidence was of no assistance to the magistrate when he examined the specimens of handwriting. Secondly, I think, with respect, that in saying that he had no doubt that the forged signature had been written by the appellant, he was

> going far beyond the proper limits. I think the true answer was given by the expert in the *Bishop of Lincoln* case, that "it is not possible to say definitely that anybody wrote a particular thing". I think an expert can properly say, in an appropriate case, that he does not believe a particular writing was by a particular person. On the positive side, however, the most he could ever say is that two writings are so similar as to be indistinguishable and he could, of course, comment on unusual features which make similarity the more remarkable. But that falls far short of saying that they were written by the same hand.' "

It is on the basis of this passage and the cases cited that counsel for the appellant submits that the document examiner went outside the province of a document examiner, and that the magistrate misdirected herself in accepting his evidence instead of forming her own opinion.

Although a judgment of the High Court of Tanzania is not binding on this court, it has considerable persuasive authority and particularly when it falls (if we may say so) from so careful a judge. Nevertheless, we do not think the passage cited provides sufficient support for the proposition sought to be based upon it. In particular, we do not find anything in the remarks of Lord Birkenhead or of Lord Hewart in the passages cited which precludes the reception in evidence of the opinion of an expert that two documents were written by the same hand. Cross on Evidence, 3rd Edition at p. 504 referring to proof of handwriting by comparison says this:

> "A document which is proved to have been signed or written by the person whose handwriting is in issue is first produced, and this is compared with the writing which is being considered by the court. On the basis of such a comparison, an expert in these matters may give evidence."

Section 48 of our Evidence Act recognises the existence of handwriting experts, and expressly allows evidence to be given of their opinions "as to identity or genuineness of handwriting". It may be that if a positive opinion is given that a particular writing is in the hand of a particular person it should be received with caution, but it seems to us that at any rate under the law of this country, a handwriting expert must be allowed to give his opinion that two documents were written by the same hand. Otherwise it is not easy to see what sort of "opinion" an expert can give on any matter concerning handwriting. That is precisely what the document examiner did in this case and we can find no substance in the submission that he went outside the proper province of a handwriting expert.

With regard to the further submission that it is for the court to make up its own mind whether a particular writing is to be assigned to a particular person, we respectfully agree, but we do not think that in this respect the evidence of a handwriting expert is to be regarded in any different way from the evidence of experts in other subjects. An expert witness should come to court prepared to justify his opinion by argument and demonstration, but he need not necessarily be called upon to do so. In many cases it is sufficient if the witness gives his opinion, and the more eminent the expert the less the need for demonstration. A doctor may give his bare opinion as to the cause of death, and a Government analyst, even in the rare cases where he is called as a witness, may state without argument his conclusion (for example) that seminal stains were found on clothing. In every case the court is entitled to accept or reject the opinion of the expert, and in that sense it must make up its own mind. The magistrate did so in this case. There was no challenge to the competence of the document examiner, and his opinion was a confident one. In the context of the other evidence before her she accepted his opinion as correct. It might, of course,

have been better if the witness had indicated either in his written report or in his evidence in court the grounds on which his opinion was based. We do not think this is a universal requirement, and we note that of the cases relied on as suggesting that this must be done, neither *Wakeford v. Bishop of Lincoln* nor *R. v. Podmore* is mentioned in Phipson on Evidence, and in Cross on Evidence (loc. cit.) the citation from the former case is prefaced by the words "strictly speaking". In the instant case the magistrate had before her the disputed writing and the specimens, and also the confident opinion of the expert that they were in the same hand. We cannot say that she was in any way wrong in her approach to the evidence and the conclusion which she drew from it.

Once it is accepted that the magistrate was justified in holding that the entry in the notebook was in the handwriting of the appellant, there was such overwhelming corroboration of the evidence of the accomplice Yunis that the magistrate must, we think, have convicted the appellant even if there had been no other corroboration.

We can deal with the other alleged matters of corroboration very briefly. It is conceded that the remark made by the appellant to the station master at Kalimoni was capable of amounting to corroboration, and we do not think the magistrate has been shown to have been wrong in finding as a fact that the remark was made. It must be conceded that the other four matters relied on as corroboration (all relating to the withdrawal by the complainant of money from the savings bank) were not corroboration in the strict legal sense, since they did not directly implicate the appellant, but they were nevertheless confirmation of the story told by Yunis and as such of strong evidential value.

That is sufficient to dispose of the first three grounds of appeal, and we are satisfied that having regard to the evidence as a whole the magistrate was fully justified in accepting the evidence of Yunis as true in substance. There are undoubtedly improbabilities in the story she told; but improbable things have been known to happen, and in this case the improbabilities are by no means all on one side.

There is in our view little substance in the remaining grounds of appeal. Once it is accepted that the appellant was a party to the plot of which Yunis has given evidence, the other matters alleged fall into place as incidental to the carrying out of the plot; and even if no direct evidence had been given of the discussions in which the plot was hatched, there would still be a strong case against the appellant based on circumstantial evidence. The magistrate was entitled to accept the evidence of the document examiner that the signature on the daily log sheet was forged by the appellant, and that the omission to mention the loading of the 100 bags of salt on the bogie allotted to Wahome amounted to the offence alleged in the third count.

We are satisfied that the convictions on all three counts were proper. The sentences were not in our view excessive, and we dismiss the appeal.

Appeal dismissed.

For the appellant:
AR Kapila
AH Malik & Co, Nairobi

For the respondent:
JB Karugu (Senior State Counsel, Kenya)
Attorney-General, Kenya

Oduol and another v Republic
[1969] 1 EA 369 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	30 August 1968
Case Number:	280 and 281/1968 (45/69)
Before:	Farrell and Trevelyan JJ
Sourced by:	LawAfrica

[1] Criminal law – Extortion – Policeman – Demanding money on threat of arrest and imprisonment – Penal Code (*Cap*. 63), *s*. 300 (1) (*a*) (i) (*K*.).

[2] Criminal Practice and Procedure – Extortion – Policeman – Demanding of money on threat of arrest and imprisonment – Interpreter as accomplice – No corroboration of evidence at end of prosecution case – Penal Code (*Cap*. 63), *s*. 300 (1) (*a*) (i) (*K*.).

[3] Criminal Practice and Procedure – Prosecution case incomplete – Accomplice as interpreter – Hearsay evidence only at end of prosecution case – Interpreter not called for prosecution – Whether confession of accomplice in defence case may be used to strengthen prosecution case – Magistrate failing to consider whether accused put upon his defence.

[4] Evidence – Accomplice – Accomplice as interpreter – Not called for prosecution – Hearsay evidence only at end of prosecution case – Magistrate failing to consider whether accused put upon his defence – Whether confession of accomplice in defence case may be used to strengthen prosecution case – Penal Code (*Cap*. 63), *s*. 300 (1) (*a*) (i) (*K*.).

[5] Evidence – Circumstantial – Extortion – Facts relied on equally consistent with having solicited a bribe – Magistrate failing to consider whether accused put upon his defence – Whether confession of accomplice in defence case may be used to strengthen prosecution case – Penal Code (*Cap*. 63), *s*. 300 (1) (*a*) (i) (*K*.).

Editor's Summary

The first and second appellants were policemen and the first complainant was picked up as a suspected shifta and handed over in custody to the first appellant. The first complainant gave evidence to the effect that while in custody he was tied to a tree and thereafter the first appellant, using the second appellant as an interpreter, told the first complainant that unless he arranged to pay the first appellant Shs. 1,000/-, he would die. The first complainant sent for the money which when it arrived was handed over to the second appellant. The first appellant then informed the complainant that he would be released. There was a further count on similar circumstances, in which the second complainant in evidence said that he was brought in under custody to the police post on the ground that he had had a visitor whom he had not reported. He was also told by the first appellant, through the second appellant, that if he did not produce Shs. 700/- he would be arrested and jailed. The second complainant produced the money and was not

thereafter re-arrested. The first appellant denied all knowledge of the facts as given by the complainants; but the second appellant's story corroborated the prosecution case. The magistrate accepted the evidence of the prosecution witnesses and regarded the second appellant's evidence as corroboration of the prosecution case and convicted both appellants. The appeal court considered whether there was any case based on admissible evidence for the first appellant to answer at the close of the prosecution case, as the only evidence of what was said to the first appellant was as to statements made through an interpreter.

Held –

(i) there was a duty upon the magistrate to consider, at the close of the prosecution case, whether a case had been made out sufficiently to require the accused to make a defence;

(ii) the prosecution case was incomplete by the failure to call the interpreter as a prosecution witness;

(iii) the only direct evidence at the close of the prosecution case as to what the first appellant said, was inadmissible as hearsay evidence;

(iv) without the evidence of the second appellant, the prosecution case would show facts equally consistent with the first appellant having solicited a bribe and the appellant was not charged with that offence;

(v) there was not sufficient evidence to put the first appellant upon his defence on the charges laid against him;

(vi) in the event of further evidence being adduced after the evidence of the first appellant, the court was entitled to consider the whole evidence for both prosecution and defence and could take advantage of the evidence given by the second appellant to round off the case against the first appellant.

Appeal dismissed.

Cases referred to in judgment:

(1) *R. v. Barnes and Richards* (1940), 27 Cr. App. Rep. 154.

(2) *R. v. Mabara* (1936), 3 E.A.C.A. 110.

(3) *Kashandago v. R.* (1950), 20 E.A.C.A. 174.

(4) *Murimi v. Republic*, [1967] E.A. 542.

(5) *R. v. Abbott*, [1955] 2 Q.B. 497.

Judgment

Farrell J: read the following judgment of the Court: In these appeals which we have consolidated, the two appellants were charged on two counts of extortion contrary to s. 300 (1) (*a*) (i) of the Penal Code. They were convicted and sentenced to eighteen months imprisonment. The magistrate omitted to impose separate sentences, but we take it that he intended to impose similar sentences on each count, to run concurrently.

The first appellant was a corporal in charge of a police post at Modogashe in the Garissa area and we shall refer to him as “the corporal”. The second appellant was the home guard commander in the same area. At this time there was trouble with shifta in those parts and the first complainant Hatari had been picked up by the military forces as a suspected shifta and handed over for custody to the police post of which the corporal was in charge. According to the first prosecution witness, Chief Inspector Joseph:

> “a person suspected of being a shifta should be interrogated by the special investigation team. Neither of the (appellants) is a member of that team. If any of them become the custodian of a shifta he must hand him over to this team.”

There was some evidence given for the defence that this rule was not universally observed, but it was at any rate the prosecution case that once Hatari had been handed over into the custody of the corporal the latter had no right to release him except for the purpose of handing him over to the investigation team.

This is to some extent borne out by an entry in the Occurrence Book referring to Hatari as a “suspected Shifta pending for investigation”.

On the day after he was brought into custody Modogashe Hatari, who at this time was tied to a tree, was interviewed by the corporal. They did not speak the same language, and the second appellant acted as interpreter. According to Hatari the corporal told him that he should either pay Shs. 1,000/-

or he should die. Hatari agreed to the demand, and the second appellant was sent to tell Hatari's brother-in-law, Daudi, that he needed Shs. 1,000/-. Daudi found the money and gave it to the second appellant to hand over to the corporal. Daudi returned with the second appellant, who told Daudi that he was going to give the money to the corporal and went into the corporal's house. He came out with the corporal, and the corporal told Hatari that he had received the money and that he would be released the next day. In due course Hatari was released.

We now come to the case of the second complainant Molu Kicha. This complainant was brought to the police post, apparently under arrest (though this is not clear from the evidence), on the ground that he had had a visitor whom he had not reported. At the police post there was a similar interview between the corporal and the complainant, the second appellant acting as interpreter. The corporal through the interpreter told the complainant that if he did not produce Shs. 700/- he would be "arrested and jailed". He went to his village with the second appellant, obtained the money and gave it to the second appellant. After that he was not re-arrested.

Apart from two cautioned statements from the second appellant, which are of minor importance in view of the evidence subsequently given at the trial, that was substantially the whole of the evidence for the prosecution. Each of the appellants was put on his defence. The first appellant gave sworn evidence, and denied that he had threatened either of the complainants or demanded money from them. He claimed that he had reported the detention of both the complainants to his superior officer, Assistant Superintendent Michael Ocaly, and that in respect of Hatari, the A.S.P. had given him the order that, if there was no sufficient evidence, the suspect should be released. If we may anticipate at this point, this evidence was confirmed by A.S.P. Ocaly who admitted that the case of Hatari had been reported to him "one Sunday" by the corporal, and that he had given a general instruction that suspected shifta should be released if on investigation there appeared no sufficient ground for them to be taken for further inquiries to Garissa.

The second appellant also gave sworn evidence, in which he made a clean breast of his part in the two transactions, merely submitting that all that he had done was to obey orders. In particular, he confirmed that the corporal had told Hatari that he was going to Garissa and that he would be taken to Nairobi to be executed, and that he could help himself by paying Shs. 1,000/-. Daudi brought the money and the second appellant gave it to the corporal. The corporal then told the second appellant to tell Hatari that he was going to be released. As regards Molu Kicha, the second appellant testified that the corporal told him he was going to be taken to Garissa because he had entertained shifta, but that he could help himself by paying Shs. 700/-. The second appellant went with him to collect the Shs. 700/- and gave it to the corporal. The second appellant was cross-examined at length by counsel for the appellant but remained unshaken.

Apart from A.S.P. Ocaly, the first appellant called four defence witnesses. Corporal Ogutu said that Hatari was released after a report from the sub-chief that Hatari was a loyal citizen. This was confirmed by the sub-chief. There was nothing of any significance in the evidence of the other defence witnesses. It may however be mentioned that there was some evidence, both for the prosecution and the defence, that the corporal had on one occasion arrested the second appellant, and that there was some resulting ill-feeling between them.

From the above summary it is abundantly clear that there was before the court evidence which, if it was believed, would justify the conviction of both the appellants. The evidence of the second appellant constitutes a full confession

of the offences alleged, and although he pleads superior orders, it is well-established that this is no defence where the orders are manifestly unlawful, and can only be taken into account in mitigation of sentence. So far as the first appellant is concerned, if the evidence given by the second appellant was properly taken into account, it was clearly open to the learned magistrate to find that the reason for the release of Hatari was not the sub-chief's recommendation but the receipt of the money demanded by the corporal, and that in the case of Molu Kicha the reason was the same. The learned magistrate in his judgment accepted the evidence of the prosecution witnesses and of the second appellant. He regarded the second appellant as an accomplice. He considered that corroboration was not needed (in strict law this may have been correct: see *R. v. Barnes and Richards* (1940), 27 Cr. App. Rep. 154) but that if it was necessary, there was ample corroboration. He accordingly found both appellants guilty and convicted them as charged.

So far as the second appellant is concerned, no ground whatever has been shown why we should interfere with his conviction. We are satisfied that he was properly convicted on both counts, and except in regard to sentence, we shall in the remainder of this judgment concern ourselves only with the conviction of the first appellant.

The point which has worried us in this appeal is that at the close of the case for the prosecution it does not appear that there was any case based on admissible evidence for the first appellant to answer. No submission was made at that stage by his counsel, for reasons which he has explained to us, and which may or may not have been good. But in any case, as we understand the law, there is a duty cast upon the magistrate at the close of the prosecution evidence to consider whether "a case has been made out sufficiently to require (the accused) to make a defence", and if he does not so find, he is obliged to dismiss the case and acquit the accused. This is the effect of s. 210 of the Criminal Procedure Code, and has not been affected by the recent amendment of that section.

The reason for our conclusion that there was no case for the appellant to answer is that at that stage the only evidence of what was said by the corporal to Hatari and to Molu Kicha was hearsay. It seems to us that the prosecution case was incomplete by reason of the failure to call the interpreter as a prosecution witness. It has been held many times in the courts of this country that where a statement has been made through an interpreter, in the absence of the interpreter's evidence the statement is hearsay. This was established by *R. v. Mabara* (1936), 3 E.A.C.A. 110, a decision which was approved in *Kashandago v. R.* (1952), 20 E.A.C.A. 174. The issue has arisen most often in connection with extra-judicial statements, but we can see no difference in principle between the case of a police officer who has recorded such a statement and is not allowed to put it in evidence unless the interpreter is called, and the circumstances of the present case where the issue is whether evidence of what the appellant said verbally to Hatari and Molu Kicha should have been admitted in evidence where the witnesses named are unable to testify of their own knowledge what it was that the appellant had said to them.

The learned magistrate touched on this issue in his judgment when he referred to the fact that the first appellant spoke to Hatari and Daudi through the interpretation of the second appellant, and later dealt similarly with the evidence of Molu Kicha. But he approached the matter in the wrong way, by considering the accuracy rather than the admissibility of the evidence. We do not entirely blame the learned magistrate since neither counsel appears to have appreciated the point at issue, or to have given him any assistance; but we think that a more experienced magistrate, as soon as Hatari began to give evidence of his

interview with the appellant, would have asked the prosecutor whether the interpreter was going to be called and put him to his election of either calling the second appellant as a prosecution witness or abandoning the evidence of what the first appellant was alleged to have said. Nothing of the kind was done, and so at the close of the prosecution case the only direct evidence of what the appellant had said was inadmissible.

State Counsel who appears in this appeal submits that nevertheless and even if the inadmissible evidence of Hatari is disregarded, there was sufficient evidence of a circumstantial nature to justify calling on the appellant for his defence. What that evidence amounts to is this: Hatari in the presence of the corporal was told by the first appellant that he must bring Shs. 1,000/- or he would die; he sent the second appellant to Daudi who produced the money, and gave it to the second appellant; the second appellant took it into the house occupied by the corporal; the second appellant came out with the corporal and told Hatari that he would be released the next day; Hatari was in fact released.

We are inclined to agree that this would amount to a *prima facie* case that as a result of money given by Hatari to the corporal Hatari was released. But the charge is extortion, not corruption: and State Counsel concedes, as we think he must, that in order to establish the character of the words alleged to have been uttered by the first appellant, the prosecution must rely upon the evidence of the second appellant. The facts relied on as circumstantial evidence are equally consistent with the corporal having solicited a bribe, and where the facts proved are consistent with the commission of either of two offences, and only one is charged, it seems to us that the well-established principles on which circumstantial evidence may be acted upon have not been complied with. If the facts proved were that consequent upon the receipt of a substantial sum of money the corporal released the suspect, that might well justify an inference of corruption; the same facts would scarcely justify the inference that a threat had been uttered, and still less the specific threat alleged in the charge. Indeed it is questionable whether the offence of demanding money with menaces could ever be established by merely circumstantial evidence without proof of the menaces uttered. In this connection we may note in passing that even from the evidence of the second appellant it is not by any means clear that there was any threat by the corporal to accuse Hatari of being a shifta. According to the evidence of the first prosecution witness, that did not lie in the power of the corporal, whose sole function was to hold him in custody until he was handed over to the special interrogation team. We do not propose to say any more on this point as it has not been raised in argument.

We are accordingly satisfied that there was not sufficient evidence to put the first appellant on his defence on the charges laid against him.

We have next to consider whether the evidence for the defence, and particularly the evidence of the second appellant, can be prayed in aid by the Republic to supply any deficiencies in the prosecution case.

It is, we think, by now firmly established that for a trial magistrate wrongly to call on an accused person for his defence is an error of law. See *Murimi v. Republic*, [1967] E.A. 542 at p. 546E: following *R. v. Abbott*, [1955] 2 Q.B. 497. It is, however, equally clear that such an error will not necessarily result in the quashing of his conviction on appeal, since in England the proviso to s. 4 (1) of the Criminal Appeal Act 1907 may be applied, and in the East African countries the corresponding provision in the respective Criminal Procedure Codes (in Kenya s. 382). In every case the question is whether the error has occasioned a failure of justice. The circumstances vary from case to case. On the one hand the accused may by his own evidence or evidence of a witness called by him supply what is lacking in the prosecution case. In such a case the

conviction will ordinarily be upheld on the ground that there has been no failure of justice. At the other extreme are cases where the damaging evidence is given not by the accused or his own witnesses, but by a co-accused. Such a case was *R. v. Abbott* (*supra*). A more unusual case was *Murimi v. Republic* (*supra*), where the magistrate himself called a witness after the close of the prosecution case, and that witnesses incriminated the accused. There is no question that in the event of further evidence being adduced after the evidence of the accused, the court is entitled to consider the whole of the evidence, both for the prosecution and for the defence, before reaching its conclusion. But both in *Abbott* and in *Murimi*, the appeal court decided that the additional evidence should have been disregarded and allowed the appeal.

If the view we have taken of the prosecution evidence is correct, we can say of this case as was said by the Court of Appeal in *Murimi* at p. 546 H.I.:

> "There was no *prima facie* case against the appellant at the close of the case for the prosecution. There was no sufficient evidence to convict him after he had given evidence."

But at that point the two cases diverge, as there has been no error here in the unjustified calling of evidence by the magistrate to the prejudice of the accused. The circumstances of this case approximate more closely to those in *Abbott* where the evidence lacking in the prosecution case was supplied by a co-accused; and we must now look more closely at the grounds of decision in that case.

In *R. v. Abbott* the appellant and his secretary were indicted for forgery of a receipt. There was ample evidence against the secretary that she had forged the name of the appellant's wife from whom he was separated. The case against the appellant was that he was a party to the fraud. A submission of no case was made but, as the court of appeal held, wrongly rejected. The appellant and his secretary both gave evidence, and the appellant insisted that he knew nothing about it. The secretary then gave evidence in which she placed the whole blame on him and stated that she gave the receipt and took the money on the appellant's authority. Both were convicted. On appeal, it was held that the appellant was entitled to have his appeal allowed as the judge had come to a wrong decision on point of law in rejecting the submission of no case and in leaving the case to the jury when there was no evidence against him at the close of the case for the prosecution. In these circumstances the Court of Criminal Appeal was not obliged to take into account the adverse evidence given against him when the case was wrongly left to the jury.

It is immediately apparent that the position is very similar in the present case, and it is arguable that by parity of reasoning the first appellant should have his appeal allowed and that the court should not take into account the adverse evidence given against him by the second appellant. But we think there is a distinction between the cases. In *Abbott's* case it was consistent with the evidence that the offence had been committed by the secretary alone without any complicity on the part of the appellant. In this case the evidence against the second appellant, including his own full confession of the case against him, necessarily presupposes the guilt of the first appellant. The court properly accepted that evidence as true, and having done so could not consistently hold that the first appellant had no part in the alleged offences. It was entitled to take into account as against the appellant the whole of the evidence, and it cannot be said that in this case to do so resulted in any failure of justice.

We think that the prosecution took a grave risk in proceeding against the first appellant without calling the second appellant as a prosecution witness, and if the second appellant had elected either to make an unsworn statement or to say nothing, the first appellant must have been acquitted. But the evidence

was given and the prosecution is entitled to take advantage of it so as to round off the case against the first appellant which was otherwise incomplete.

For these reasons we dismiss the appeals against conviction of both the appellants. With regard to sentence, we substitute in the case of the first appellant a sentence of eighteen months on each count, to run concurrently. We do not consider that the second appellant was to blame to the same extent as the first appellant and we reduce his sentence to nine months on each count, to run concurrently.

Appeals against conviction dismissed. Sentences varied.

For the first appellant:
HC Kapila
DV Kapila & Co, Nairobi

The second appellant did not appear and was not represented.

For the respondent:
OP Nagpal (Senior State Counsel, Kenya)
Attorney-General, Kenya

C T v M W
[1969] 1 EA 375 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	26 July 1968
Case Number:	254/1968 (46/69)
Before:	Farrell and Chanan Singh JJ
Sourced by:	LawAfrica

[1] Affiliation – Evidence – Corroboration – Whether admission of intercourse with mother is corroboration of her evidence.

[2] Costs – Appeal – From order under the Affiliation Act – Whether costs can be awarded – Affiliation Act (*Cap.* 142), *ss.* 5 (2) (*d*), 14 *and* 16 (*K.*).

[3] Evidence – Corroboration – Affiliation – Whether admission of intercourse with mother is corroboration of her evidence.

Editor's Summary

The appellant, who had been adjudged to be the father of the respondent's child, appealed, contending

that there was no evidence corroborating that of the respondent. He had admitted having sexual intercourse with the respondent four months before the conception of the child.

Held –

(i) there was ample evidence corroborating the evidence of the respondent: the fact of previous intercourse being material rather than its interval from the date of conception;

(ii) costs would be awarded on appeal under the Affiliation Act.

Appeal dismissed with costs.

Cases referred to in judgment:

(1) *Cole v. Manning* (1877), 2 Q.B.D. 611.

(2) *Moore v. Hewitt*, [1947] K.B. 831.

(3) *Simpson v. Collinson*, [1964] 1 All E.R. 262.

(4) *D.G. v. E.W*. (Kenya High Court Miscellaneous Appeal No. 8 of 1967) (unreported).

Judgment

Farrell J: read the following judgment of the Court: This is an appeal by the defendant to a summons under s. 5 of the Affiliation Act (Cap. 142) against the decision of the second class magistrate, Kiambu, adjudging him to be the putative father of the child born to the complainant and ordering him to pay to the complainant Shs. 50/- per month for the maintenance of the child.

The only substantial ground relied on by the appellant in his petition of appeal is that there was no corroboration of the complainant's evidence.

Counsel for the appellant has argued the case forcefully, but in our opinion with no chance whatever of succeeding. The law in regard to affiliation is not materially different in this country from the law in force in England, and it is only necessary to refer to two cases to show that there was ample corroboration of the complainant's evidence in this case. In *Moore v. Hewitt*, [1947] K.B. 831 it was laid down (and we quote from the headnote) that where in proceedings of this nature there is evidence that over a long period, including the time of conception, the putative father has chosen to associate with the complainant on terms of close affection and there is no evidence that she was associating with other men, material exists which the court is entitled to treat as corroboration of the complainant's evidence in some material particular, as required by the relevant law (in this case s. 5 (2) of the Act). The learned magistrate found that this was the case between the parties in the instant case, and there was ample evidence on which he could so find. The second case is *Simpson v. Collinson*, [1964] 1 All E.R. 262, in which it was held that an admission by a man against whom an affiliation order is sought that he had sexual intercourse with the applicant mother within two or four months of the conception of her child is capable in law of being corroboration "in some material particular" of her evidence that he also had intercourse (which he denied) at the time of conception. In the instant case the appellant admitted he had had sexual intercourse with the complainant on October 30, 1964. The child was born on November 7, 1965, and according to the mother it was conceived in February, 1965. The interval is not substantially longer, if at all, than the interval mentioned in the English case. But it is the fact of previous intercourse, rather than the length of the interval, which is material, as is apparent from two passages in the judgments. Danckwerts, L.J., at page 263 I said:

> "It seems to me that in this case the admissions made by the complainant that he had had intercourse twice with the appellant, albeit at a date before the child could possibly be conceived, is capable of being corroboration of the appellant's evidence. It is corroboration of the mother's story in a material particular, as it seems to me, namely, that she had been on intimate terms with the respondent, so much so that he admits that they had intercourse within a few weeks of the alleged intercourse resulting in the conception – the strongest evidence of inclination of the respondent to have intercourse with the appellant that one could have."

In a concurring judgment Davies, L.J., at page 265 referred to *Cole v. Manning* (1877), 2 Q.B.D. 611, a case in which the child had been conceived in January, 1875, and corroboration was found in acts of familiarity (falling short of intimacy) in the summer of 1874. After citing from the judgment in that case, the learned Lord Justice remarked:

> "How much more relevant, I ask, is evidence of an admission by the putative father that in fact a comparatively short time before the date when the child must have been conceived he had actually had intercourse with the appellant?"

We are satisfied that there was ample corroboration in the present case

both from the admission of the appellant and the evidence of the complainant's witness, Hannah Wanja, nor do we see any grounds for suggesting that the evidence of this witness was not worthy of belief.

We have no hesitation in dismissing the appeal and we confirm the order of the learned magistrate.

Appeal dismissed.

July 31, 1968. After hearing argument on costs the Court made this Order: The successful respondent asks for the costs of the appeal. So far as the law is concerned, the position is not clear. Under s. 5 (2) (*d*) the mother if successful before the magistrate may be granted the costs of obtaining the order, and under s. 5 (6) the mother if unsuccessful may be ordered to pay the father's costs. If costs may be awarded in the subordinate court, it would appear in principle that they should also be awarded on appeal. But s. 14 provides that appeals shall be "under and subject to the provisions of the Criminal Procedure Code", and this would *prima facie* exclude an order for costs. On a comparison, however, between s. 14 and s. 16 (which deals with procedure) it is arguable that s. 14 is intended to deal only with procedure, and entitlement to costs is not in our view merely a matter of procedure. On a consideration of the law alone the court is inclined to the view that a successful appellant should be awarded costs. It is, however, unnecessary to review the matter on this basis, since in *D.G. v. E.W*. (Miscellaneous Appeal No. 8/67) (unreported), on appeal from an affiliation order, this court (consisting of Ainley, C.J., and Trevelyan, J.) awarded the appellant the taxed costs of his appeal and also costs in the lower court. We understand that this was not a new departure, and basing ourselves on a precedent which is binding on us, we award the appellant the costs of the appeal which in default of agreement we direct should be taxed.

For the appellant:
MZA Malik
AH Malik & Co, Nairobi

For the respondent:
SN Waruhiu
Waruhiu & Co, Nairobi

Okello v Republic
[1969] 1 EA 378 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	1 March 1968
Case Number:	1337/1967 (47/69)
Before:	Sir John Ainley CJ and Trevelyan J
Sourced by:	LawAfrica

[1] Criminal Practice and Procedure – Plea – Change of – After conviction – Accused changing plea

from "guilty" to "not guilty" – Magistrate allowing alteration after conviction – Magistrate functus officio.

Editor's Summary

The appellant was charged with giving false information contrary to s. 6 of the Public Service Commission Act, and after his conviction on his own confession the magistrate allowed the accused to change his plea to "not guilty" and set aside the conviction. The case was remanded for re-trial and on the second trial the appellant again pleaded "guilty" and again, after conviction, attempted to change his plea. The second magistrate refused to set aside the conviction and sentenced the appellant. The appellant appealed against the conviction and the sentence imposed by the second magistrate.

Held –

(i) the magistrate on the first hearing, having convicted the appellant on his own confession, had deprived himself of all powers save the power to sentence;

(ii) case remitted to magistrate of first hearing for sentence.

Appeal allowed.

Cases referred to in judgment:

(1) *Yusufu s/o Maumba v. Republic*, [1966] E.A. 167.

(2) *R. v. Guest*, [1964] 3 All E.R. 385.

(3) *Joseph Mugola v. R.* (1953), 20 E.A.C.A. 171.

(4) *Derek Lawrence Searle v. R.* (1955), 22 E.A.C.A. 443.

Judgment

Sir John Ainley CJ: read the following judgment of the Court: In this case the appellant was convicted of an offence contrary to s. 6 of the Public Service Commission Act. We quashed the conviction from which appeal was made, but ordered that the appellant should appear for sentence before Mr. Mitra, a Resident Magistrate, who convicted the appellant for the same offence on his own confession as far back as June, 1967, but who, wrongly as we think, set aside that conviction and permitted a plea of "not guilty" to be entered. Having said so much it is clear to us that we must, in the interest of clarity, say a great deal more, and we will set matters out methodically from the beginning.

In November, 1964, the appellant applied for the post of Settlement Officer to the Public Service Commission. He filled in a form for the information of that Commission and, there is not the slightest doubt, answered the question, "Have you ever been convicted on a charge in a Court of Law", in the negative. The appellant had in fact been convicted by a court of law four times. He had been convicted of transmitting a threatening letter in 1956, of fraudulent false accounting in 1957, of creating a disturbance in 1958, and of theft in 1960. These matters were not discovered until last year, it seems, and on June 2, 1967,

the learned Attorney-General sanctioned a prosecution under the section to which we have referred.

We do not say that the charge when finally drafted was a model of its kind, but when the appellant was brought before the Resident Magistrate, Mr. Mitra, on June 16, 1967, he very clearly desired to admit that he had contravened the provisions of s. 6 of the Act, and the learned magistrate convicted him on his plea.

He recorded –

> "Accused convicted as charged of the offence of false information to the Public Service Commission contrary to section 6 of the Service Commission Act."

The prosecutor then spoke very briefly about the offence and referred to the appellant's previous convictions.

The magistrate then recorded:

> "*Allocutus*: Accused states now that he wishes to change his plea, as he was in confused state of mind when he accepted his guilt.
>
> *Ruling*: As I have not yet proceeded to sentencing the Accused, he will be allowed to change his plea. A plea of 'Not Guilty' is entered."

The case was then set down for hearing on a distant date. The so-called trial began on August 31, but was broken off because the prosecutor was perturbed when the application form, which so far as we can make out was the basis of the original prosecution, was produced. He said, "In view of the production of Exh. 4 about which I did not know I apply for an adjournment to take further instructions." We do not fully understand that remark.

Towards the end of September another charge was filed to which the learned Attorney-General gave his consent. We are somewhat in the dark about the whole matter, but this new charge must surely have been based on the same facts as the old charge, though the positive element of giving false information was more clearly and satisfactorily stated in the particulars of the new charge.

Oh December 6, 1967, the appellant appeared before the Senior Resident Magistrate, Mr. McCready, upon this new charge. He was represented by counsel and he again admitted his guilt quite unequivocally. The learned magistrate recorded a conviction. The appellant's counsel then said that the appellant had something to explain to the court, and the appellant embarked upon a lengthy statement. Towards the end of this statement he said, "I did not intend to mislead anybody. I did not do it wilfully." Thus in December matters were back where they had been in June. It is of course apparent that this kind of thing could be repeated endlessly, given an indulgent magistrate. However the Senior Resident Magistrate was not indulgent. He said that he did not consider that the appellant should be permitted to withdraw his plea and he sentenced him.

It is the conviction and sentence of the Senior Resident Magistrate which we have set aside. We deeply regret the necessity for doing so, but we consider ourselves bound by the decision of the Court of Appeal for East Africa in the case of *Yusufu Maumba v. Republic*, [1966] E.A. 167. That was a Tanzanian case, but we can detect no significant difference between the law of Tanzania and the law of Kenya touching the matters in question here. Yusufu Maumba was charged before a magistrate with six counts of stealing contrary to s. 271 of the Penal Code and to s. 265 of the Tanzanian Penal Code. Section 265 is the general theft section. Section 271 deals with stealing as a clerk or servant. Yusufu pleaded guilty to five counts and the magistrate recorded a conviction on each of those five counts, but

deferred sentence until the trial of the sixth

count had been completed. The sixth count was, however, withdrawn, and the prosecutor then applied to amend the other counts by substituting a reference to s. 270 of the Code for the reference to s. 271.

Now s. 270 of the Tanzanian Code deals with theft by a person employed in the public service. Yusufu, it appears, was a clerk or servant employed in the public service. The amendments were made and Yusufu was asked to plead again. Unsuspectingly, it would seem, he pleaded guilty once more and was again convicted. He was then sentenced, and because the Minimum Sentences Act 1963 provided that an offence contrary to s. 270 of the Penal Code must be punished by flogging, and a minimum of two years imprisonment, he was sentenced to a flogging and to imprisonment for the period named. Yusufu, who may have felt that he was the victim of sharp practice, appealed. The High Court of Tanzania approached the problem by inquiring whether the trial of Yusufu had concluded before the amendment was made, for under s. 209 of the Tanzanian Criminal Procedure Code a charge may be amended, subject of course to safeguards, "at any stage of a trial". The High Court said in effect that since no sentence had been passed, and the judgment was therefore incomplete, the trial had not come to an end. Accordingly, the High Court held, the amendments were properly made, and it followed that the convictions and sentences in respect of the amended charges were lawful.

The Court of Appeal for Eastern Africa said of this reasoning:

> "With respect, we think this misses the essential point. The trial magistrate had convicted the appellant and he had no power to quash that conviction, nor did he purport to do so. While that conviction remained in force the appellant could not be charged with or convicted of what was substantially the same offence. Therefore the proceedings which followed the first conviction were without jurisdiction and are a nullity. We are strengthened in our opinion by the case of *R. v. Guest*, [1964] 3 All E.R. 385, which shows that in England a Court which has convicted an accused person is functus officio except as regards the power to pass sentence."

The Court of Appeal then quashed the so-called second convictions and sentences, and passed the sentence which they thought proper in respect of the first convictions. This decision of the Court of Appeal created surprise in the minds of some lawyers in Kenya, because for very many years it has been supposed that a magistrate in Kenya who had convicted on the accused's own confession but had not proceeded to sentence could, in his discretion, permit the accused to withdraw his admission of guilt, or plea of guilty, and to enter a plea of "Not Guilty". This was no doubt an unscientific notion, but it was a vastly convenient one. It saved, on occasion, a great deal of time, and obviated both hardship and injustice. It is also worth mentioning that there are at the very least two decisions of the Court of Appeal for Eastern Africa which appear to recognise that a discretion of the kind we have mentioned exists. We cite the case of *Joseph Mugola v. R.* (1953), 20 E.A.C.A. 171 and the more celebrated case of *Derek Lawrence Searle v. R.* (1955), 22 E.A.C.A. 443. There may indeed be a strong case for amending the Criminal Procedure Code so as to render lawful a time honoured and very useful procedure. But there is no doubt whatever as to the law declared by the Court of Appeal and by their declarations this Court is bound. The Resident Magistrate, Mr. Mitra, having convicted the appellant on his own confession had deprived himself of all powers save the power to sentence. The conviction recorded by Mr. Mitra still stands and it is his duty to sentence the appellant. All that followed the purported withdrawal of the plea of guilty is a nullity, and has for that reason been set aside.

The order that the appellant be once more brought before Mr. Mitra is now, we hope, comprehensible.

We add that this man has been in custody a long time already, and though he is the author of his own misfortune, being incapable it seems of keeping his courage at the sticking point, he may, just possibly, have learned his lesson.

Order accordingly.

For the appellant:
MZA Malik
AH Malik & Co, Nairobi

For the respondent:
JR Hobbs (Deputy Public Prosecutor, Kenya)
Attorney-General, Kenya

Kutiti v Republic
[1969] 1 EA 381 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	26 November 1968
Case Number:	885/1968 (48/69)
Before:	Wicks and Miller JJ
Sourced by:	LawAfrica

[1] Criminal Law – Stock theft – Illegal possession of stock in a proclaimed area – No evidence of failure of accused to account for possession – Stock and Produce Theft Act (*Cap.* 355), *s.* 9 (1) *and* (2) (*K.*).

[2] Criminal Practice and Procedure – Stock theft – Illegal possession of stock in a proclaimed area – No evidence of failure of accused to account for possession – Stock and Produce Theft Act (*Cap.* 355), *s.* 9 (1) *and* (2) (*K.*).

Editor's Summary

The appellant was found in possession of a cow on April 4, 1968, identified as belonging to the complainant and allegedly stolen from the complainant four years previously. The appellant was charged with illegal possession of stock reasonably suspected of having been stolen in terms of s. 9 (1) and (2) of the Stock and Produce Theft Act and at his trial he claimed ownership of the cow and called witnesses to show that the brand on the animal was his. The appellant was convicted and appealed on the ground that there was no evidence from the police that the appellant had been required to account for his possession

of the cow and had failed to do so, or that the appellant gave an account which the police found insufficient. Section 9 (2) states that it shall be sufficient in order to raise a reasonable suspicion that the stock is stolen or unlawfully obtained if, when required on arrest to account for possession of the stock, the person arrested fails to give a sufficient account. A further ground of appeal was that the magistrate was wrong in law and in fact in relying on his own observations as to the age of the cow. This fact was relevant in regard to the evidence of one of the appellant's witnesses who claimed that the cow was born in 1965.

Held –

(i) the appellant gave an explanation of his possession and there was therefore no reasonable suspicion that the cow had been stolen or unlawfully obtained;

(ii) the magistrate's opinion as to the age of the cow, even if accurate, was rebuttable and should not have been used to supplement evidence of which there was no categorical acceptance per se;

(iii) there was no alternative conviction supportable on the evidence.

Appeal allowed, conviction quashed and sentence set aside.

No cases referred to in judgment

Judgment

Wicks J: read the following judgment of the Court: The appellant was convicted and sentenced to five years' imprisonment and twenty-four strokes for the offence of illegal possession of stock in a proclaimed district reasonably suspected of being stolen or unlawfully obtained, contrary to s. 9 (1) of the Stock and Produce Theft Act (Cap. 355). He appealed against conviction and sentence.

We must observe forthwith that one Chepkwony Arap Lasoi, the second prosecution witness, was stated in the particulars of offence to be the owner of the cow, subject matter of the charge; and this witness, a Kipsigis living at Mulot, Narok District, testified claiming the cow as his property and alleging that it was stolen from him about four years prior to its discovery in the possession of the appellant. We are not informed why the appellant was not charged with theft of the cow instead of under the abovementioned statute, thereby compelling the trial court to consider the case as a whole by way of an indirect approach to the facts in the possession of the prosecution.

The facts of the prosecution's case were quite simple. The complainant, Chepkwony Arap Lasoi, alleged that ten head of cattle were stolen from him in the Narok District about four years prior to the arrest of the appellant. The complainant reported the loss of the cattle to the police when they were discovered missing and on April 4, 1968, a cow identified by the complainant and three other witnesses as the complainant's stolen property was found in the manyatta of the appellant. At the trial the appellant claimed the cow and called witnesses to support him with respect to marks on the animal in order to show that he was the true owner. After considering the evidence the trial magistrate found in terms of the statutory provisions creating the offence charged as follows:

> "I am satisfied that the accused was found in possession of a cow reasonably suspected of being stolen or unlawfully obtained."

Put briefly, the essence of the first and second grounds of appeal is that apart from the absence of evidence to support the conviction the procedural provisions of the statute creating the offence and under which the appellant was expressly convicted were not observed and consequently the conviction was wrong in law. These are the relevant provisions:

> "9 (1) Any person who has in his possession in a proclaimed district any stock which may reasonably be suspected of being stolen or unlawfully obtained shall, if he fails to prove to the satisfaction of the court that he came by the stock lawfully, be guilty of an offence and liable on conviction to the penalties prescribed for theft.
>
> (2) For the purposes of this section it shall be sufficient in order to raise a reasonable suspicion that the stock is stolen or unlawfully obtained, if when required by the person who arrests him to account for the possession of such stock, the person arrested fails to account therefore or gives an account which the person who arrests him reasonably finds insufficient."

In particular the second ground of appeal relates to sub-s. (2) above, i.e. "There was no evidence from the fifth prosecution witness P.C. Lemedeo Parshao the person who arrested the appellant:

(*a*) that he required the appellant to account for his possession of the cow;

(*b*) that the appellant failed to account for the possession of the cow; or

(*c*) that the appellant gave an account which the said Parshao found insufficient."

It is therefore necessary to reproduce the evidence of Constable Parshao, viz.:

> "I am police constable stationed at Narok. On 4.4.68 I accompanied a Kipsigis to Nao Nyiro where he said his cow was. In the manyatta we found the cow in question. The man who had the cow was in and Kipkemo showed us the cow which had a calf. The Masai said that it was his. We arrested him and brought him to Narok Police Station. The cow is red and white. It had marks in the ears. The accused showed us two of his bulls whose brands resemble those of the cow."

It is quite clear that at the moment of apprehension the appellant laid a claim of right to the ownership of the cow, pointing out others of his cattle bearing a similar identification brand as that on the cow; and that there was no express compliance with the provisions of sub-s. (2) quoted above. It cannot therefore be said that at the time of the appellant's arrest there was a reasonable suspicion that the cow was stolen or unlawfully obtained.

The question arises whether this is fatal to the proceedings before the magistrate, i.e. whether the magistrate is in effect precluded from coming to this conclusion on proper evidence and convicting under s. 9 (1). We answer this question in the negative but this does not exhaust the matter.

Theft and unlawful possession of property are provided for in the Penal Code. The principal object of Cap. 355 so far as the State as opposed to the individual is concerned is "to make persons liable to account for the possession of stock or produce in certain cases". There is therefore on the face of it a duplication of penal legislation in the Penal Code and Cap. 355 for the unlawful possession of stock, Cap. 355 relating to such possession in "certain" or special cases. Although s. 9 (1) of Cap. 355 provides that on conviction for the offence under that section the person convicted shall be liable to the penalties prescribed for theft, this does not amount to saying that the offence of theft created by ss. 275 and 278 of the Penal Code is replaced by the offence created by s. 9 (1) of Cap. 355, for the law does not allow of offences by construction. The words ". . . be guilty of the offence of theft" form no part of the subsection; and the definition of "theft" in the interpretation of s. 2 of the Act cannot be invoked for purposes of showing the offence created by s. 9 (1) as it stands.

The object of Cap. 355 is stated as follows:

> "An Act to provide for the recovery of fines imposed on Africans (including Somalis) for the theft of stock or produce by levy on the property of the offender or his family, sub-tribe or tribe and to make persons liable to account for the possession of stock or produce in certain cases";

and s. 17 of the Act provides that:

> "All offences under this Act shall be cognizable to the police."

We venture to say that the tenor of the provisions of the entire Act is administrative with a view to suppressing tribal clashes, protecting the stock and produce of residents in the special districts proclaimed under the Act and compensating such persons as are shown to have suffered as a result of the mischief the Act aims at preventing. We are of the view that, whereas in the promulgating of the Act Cap. 355 the legislature treats theft and unlawful possession in special manner concurrent with existing legislation touching the said matters in relation to the country as a whole, then regard must be had to the provisions in the Act which deal with procedure or evidence for the purposes of offences created by the Act and these must be closely followed within the spirit of the Act. It is not without reason that the legislature made offences under the Act specifically cognizable to the police, and s. 9 (2) of the Act should be read in conjunction

with s. 17. The appellant's arrest was in fact effected by the police and we do not hesitate to say that the evidence of the fifth prosecution witness shows no "reasonable suspicion" warranting the appellant's arrest for purposes of a prosecution under s. 9 (1) of the Act.

It would appear that further to the intention of the legislature opined above it was also intended that persons within the proclaimed districts should not be capriciously deprived of the possession of stock or produce by anyone hence the provisions of s. 9 (2) of the Act. The magistrate's finding that the appellant was "found in possession of a cow reasonably suspected of being stolen or unlawfully obtained" is not supported by the evidence of P.C. Lamedeo Parshao who arrested the appellant. The trial court was therefore left with the evidence of the civilians on both sides and this leads us to the fourth ground of appeal, i.e. "that the magistrate was wrong in law and fact in relying on his observation as to the age of the cow".

The paramount issue before the magistrate was identification as to which there was grave conflict between the claims of the prosecution witnesses and those of the defence. In coming to his decision in favour of the prosecution on this issue it was imperative to find that the cow was in fact over four years old. Without expressly saying that he accepted the evidence of the prosecution witnesses as to the age of the cow the magistrate said:

> "I am satisfied that the accused and his witnesses have told lies to the court to save the accused. There is a great deal of confusion about their brand marks. Most of the defence witnesses claimed that the cow belonged to them. My observation of the cow has made me believe that the cow was not born in 1965 as claimed by one of them. It is older."

This observation and resultant belief by the magistrate appears to be the basis on which he in effect preferred the prosecution's evidence to that of the defence and thus influenced he convicted the appellant. We are not satisfied that the magistrate made proper use of his power to judicially notice the ordinary course of nature if so it was, in turning the balance of the evidence before him towards conviction of the appellant. Even assuming that the magistrate's opinion bore an element of accuracy it was merely *prima facie* and rebuttable and should not have been used in the manner it was in the judgment, i.e. supplementing in effect evidence as to which there was no categorical acceptance per se. We find this highly prejudicial to the appellant and consider it unsafe to allow the conviction to stand.

We have also considered whether an alternative conviction by this court is available in respect of the evidence as a whole, but find that such a step is not open to us.

The appeal is allowed, the conviction quashed and the sentence set aside.

Appeal allowed.

For the appellant:
MK Bhandari
Bhandari & Bhandari, Nairobi

For the respondent:
JR Hobbs (Deputy Public Prosecutor, Kenya)
Attorney-General, Kenya

Boyes v Gathure
[1969] 1 EA 385 (CAN)

Division:	Court of Appeal of Nairobi
Date of judgment:	27 February 1969
Case Number:	44/1968 (49/69)
Before:	Sir Charles Newbold P, Sir Clement de Lestang V-P and Spry JA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Chanan Singh J

[1] Civil Practice and Procedure – Caveat – Application for removal of caveat lodged under Registration of Titles Act – Correct procedure by originating summons – Registration of Titles Act (*Cap*. 281), *s.* 57; *Government Lands Act* (*Cap*. 280), *s*. 116 (*K*.).

[2] Civil Practice and Procedure – Nullity – Whether application by summons instead of originating summons a nullity or only an irregularity.

[3] Land Registration – Caveat – Nature of registrable interest not disclosed.

[4] Land Registration – Caveat – Removal of – Proper procedure for application for – Registration of Titles Act (*Cap*. 281), *s*. 57 (*K*.).

Editor's Summary

The respondent lodged a caveat against the title to the appellant's land which was registered under the Registration of Titles Act. The caveat forbade all dealings and claimed "a beneficial interest". On the application of the appellant the Registrar gave notice to the respondent to remove the caveat and the respondent applied to the High Court by a Chamber summons for an order extending the life of the caveat. The High Court made the order and the appellant appealed, alleging that the application was incompetent because it was brought in an incorrect form, and that the caveat did not show the nature of the registrable interest claimed.

Held –

(i) "summons" in s. 57 of the Registration of Titles Act means an originating summons if there is no suit in existence; or an interiocutory summons if there is a suit in existence;

(ii) use of the wrong procedure did not invalidate the proceedings, because:

(*a*) it did not go to jurisdiction, and

(*b*) no prejudice was caused to the appellant

(*Namukasa v. Bukya* (3) and *Kigoya v. Attorney-General of Uganda* (4) distinguished);

(iii) the nature of the registrable interest claimed was not disclosed by the caveat, and it should have been rejected by the Registrar.

Observations on the manner of drawing a caveat claiming an interest in part only of the land comprised in the title against which the caveat is registered.

Appeal allowed. Order of the High Court discharged and application dismissed.

Cases referred to in judgment:

(1) *St. Benoist Plantations Ltd. v. Felix* (1954), 21 E.A.C.A. 105.

(2) *Macfoy v. United Africa Co. Ltd*., [1961] 3 All E.R. 1169.

(3) *Namukasa v. Bukya*, [1966] E.A. 433.

(4) *Kigoya v. Attorney-General of Uganda*, [1966] E.A. 463.

(5) *Nanjibhai Prabhudas & Co. Ltd. v. The Standard Bank Ltd*., [1968] E.A. 670.

[**Editorial Note**: No reference is made to *Lone v. Patel*, [1968] E.A. 606, a decision of the High Court of Kenya, the report of which had not been received when judgment was given. On the question of what is the proper procedure to be taken under the Act, it is submitted that *Lone v. Patel* must be taken to have been overruled by this case.]

February 27, 1969. The following considered judgments were read:

Judgment

Spry JA: The appellant is the registered proprietor of certain land registered under the Registration of Titles Act (Cap. 281). In June, 1968, a caveat was lodged against the title on behalf of the respondent. The appellant then applied to the registrar, under s. 57 (6) of the Act, to remove the caveat and, in accordance with that subsection, the registrar gave notice in writing to the respondent, who applied to the High Court for an order extending the life of the caveat. The learned judge granted the order, and it is against that decision that this appeal is brought.

The first ground on which the application was opposed, and the first ground of appeal in this Court, is that the application was brought in an incorrect form and was consequently incompetent. The application was intituled "Miscellaneous Civil Suit No. 82 of 1968" and was headed "Chamber Summons". It is conceded that the reference to a suit was wholly inappropriate, as there was no suit in being.

The application to the court was made under sub-s. (8) of s. 57, which enables a caveator to "apply by summons". The submission of Mr. Da Gama Rose, both in the High Court and before us, was that this necessitates an application by way of originating summons. In fact, the application was in the form normally used for initiating interlocutory applications. I may observe here that this is not, so far as I am aware, a statutory form in Kenya: it is a form derived from England, where it is used for interlocutory and certain other applications, but never, so far as I am aware, where there is no action in being.

In dealing with this objection, the learned judge observed that if he were to read "by summons" as meaning by originating summons, he would, in effect, be amending the legislation. He remarked also that it had been the custom of the court, in the past, to allow such proceedings to be brought by "ordinary Chamber Summons".

With great respect, I think the learned judge was wrong and I think much of the confusion arises from the heading "Chamber Summons" which is commonly used for interlocutory summonses in Kenya but not, I think, in England; certainly it does not appear in the forms contained in the Annual Practice or Atkin's Encyclopaedia of Court Forms and Precedents. In fact, both originating and interlocutory summonses are heard, at least in the first instance, in chambers, and "chamber summons" is not a term of art to distinguish the one from the other. In the present case, where the respondent desired to move the court, where no proceedings were in being and where the Act required him to proceed by summons, such a summons could only, as I see it, be originating.

Mrs. Khanna, who appeared for the respondent, sought to rely on a dictum of this Court in *St. Benoist Plantations Ltd. v. Felix* (1954), 21 E.A.C.A. 105, at page 108, where, commenting on the difference between originating summonses and originating motions, it was said that:

> " 'Originating summons' is a term of art both here and in England. It refers in each case to a special and limited class of summonses, the class being different in the two jurisdictions . . . "

I would respectfully agree, but the fact that originating summonses are only appropriate to certain kinds of proceedings does not mean that their use is restricted to the proceedings set out in Order XXXVI of the Civil Procedure (Revised) Rules 1948. As Mr. da Gama Rose pointed out, Order XXXIII provides for the institution of interpleader proceedings by originating summons, while rule 2 of the Matrimonial Causes Rules prescribes the same procedure for applications for leave to petition for divorce within the first three years of marriage. I notice also Order XXI, rule 58 and there may well be other provisions. In any case, I can see no reason why the class of applications to be initiated by summons should not be enlarged.

As I see it, procedure by way of summons may be originating or interlocutory and when s. 57 of the Registration of Titles Act speaks of applying "by summons", it means by originating summons, if there is no suit in existence, or by interlocutory summons, if there is.

The more difficult question, I think, is whether the adoption of the wrong procedure invalidates the proceedings, but in my opinion it does not. I would make it clear that I think the learned judge was entitled to reject the application and, indeed, should have done so. In many cases where an incorrect procedure has been adopted it is possible to remedy the error by permitting amendment, but the procedure on an originating summons is so different from that on an interlocutory summons that I doubt if amendment would have been proper. There is, however, no need to decide that, since no application for amendment has been made at any stage.

So far as this appeal is concerned, however, the position is that the learned judge made an order which he certainly had jurisdiction to make on a proper application, and I do not think that the fact that the application was in an incorrect form meant that he lacked jurisdiction. If, as I think, he had jurisdiction, the error of procedure is not a ground for interfering with his decision, since no prejudice whatever was caused to the appellant (see rule 77 of the Eastern African Court of Appeal Rules 1954).

In saying this, I am not overlooking two judgments of the Chief Justice of Uganda, in *Namukasa v. Bukya*, [1966] E.A. 433 and *Kigoya v. Attorney-General of Uganda*, [1966] E.A. 463, both cases in which applications in wrong form were struck out as incompetent. Certain remarks in those judgments, taken in isolation, might appear to suggest that a court lacks jurisdiction if the initial step in the proceedings is in a form contrary to a statutory requirement, but reading the judgments as a whole, and having regard particularly to references to the possibility of amendment, I am satisfied that that was not what the learned Chief Justice intended.

While agreeing with Mr. da Gama Rose that the application was in the wrong form and was improperly intituled, I would reject the first ground of appeal, since, in my view, the irregularity does not go to jurisdiction and has not occasioned any failure of justice.

The other issue in the High Court and the second ground of appeal concern the caveat which gave rise to the proceedings. In this Mrs. Khanna, on behalf of the respondent, claimed "a beneficial interest" in "Land Reference Number 8867 registered as Number I.R. 11836/1" and forbade "absolutely" the registration of any dealing with the land. Mr. da Gama Rose attacked this on two grounds, first that the interest claimed in the land was not sufficiently defined and secondly, that while it appears that the respondent was only claiming part of the land registered in the appellant's name, the caveat does not describe or indicate which part of the land is so claimed.

As regards the first part of this argument, the learned judge would appear to

have misunderstood the nature of the objection, because he has treated it as part of another argument, advanced in the High Court but now abandoned, that adverse possession does not give rise to a registrable interest. Mr. da Gama Rose's argument, as I understand it, is that s. 57 requires a caveat to be in the prescribed form and the prescribed form, by a blank space and an explanatory footnote, requires a caveator to disclose the

> "Nature of registrable interest claimed in land".

Mr. da Gama Rose submits, and I agree, that the words "a beneficial interest" are not a sufficient compliance with this requirement. I think it is quite clear that a caveator must state whether he is claiming the fee simple in the land, or a term of years, or a charge, or an easement, or as the case may be. I consider also that it is proper and desirable, although I would concede not statutorily necessary, to disclose the basis of the claim. Thus, for example, it would be proper, in the appropriate circumstances, for a caveator to claim to be entitled to the fee simple in a piece of land by virtue of a contract of sale bearing a certain date. "A beneficial interest" means no more than that the respondent claims an unspecified interest beneficially, that is, on his own behalf and not as a trustee. The caveat in the present case therefore gives no indication of what the interest is or how it was acquired. As such, it does not, in my opinion, comply with the requirements of the Act. This is more than a mere technical irregularity, because a caveat is intended to serve a two-fold purpose: on the one hand, it is intended to give the caveator temporary protection, and on the other, it is intended to give notice of the nature of the claim to the person whose estate in the land is affected and to the world at large. Unless the nature of the claim is disclosed, neither the caveatee nor any other person with an interest in the land knows whether or not to object to the caveat. For these reasons, I consider that the caveat was so defective that it ought to have been rejected by the registrar, and therefore ought not have been extended by the learned judge, and I would allow the appeal on this ground.

As regards the description of the land claimed, the position is different. The caveat as lodged clearly claims an interest in the whole of the land comprised in the registered title. So far as the registrar was concerned, the caveat was in order in this respect and he cannot be criticized for accepting it. In fact, it appears from the affidavit annexed to the summons that the respondent only claims part of the land comprised in the title. The caveat is, therefore, in my opinion, bad, as affecting land to which the respondent has, admittedly, no claim whatever, but this irregularity only became apparent when the matter came before the High Court. It would, in my opinion, have been a ground on which the learned judge could have dismissed the application but there has been no appeal on that aspect of the case.

The learned judge expressed the view that an interest in a piece of land could be protected by caveat even though the land was unsurveyed. With that proposition, I would have no hesitation in agreeing. I would, however, with respect, agree with Mr. da Gama Rose's submission that a reasonable attempt must be made, even if it is in the most informal language, to describe the area and situation of the land claimed. I would not, however, agree that the failure to do this made the caveat a nullity, because, as I have said, it was expressed to protect a claim to the whole of the land, and in this respect it was effective as a caveat, even though the claim it was expressed to support could not be justified.

However, as I have said, I think the caveat was bad as not disclosing a claim to a registrable interest in land. I would allow the appeal, set aside the order of the High Court and substitute an order dismissing the application with costs and I would allow the appellant the costs of the appeal.

Sir Charles Newbold P: Two points arise on this appeal. The first is whether the procedure adopted was correct and the second is whether the caveat was properly entered.

As regards the first point, the chamber summons initiated proceedings in court between the parties. The form was that of an interlocutory summons, which is not a suitable form to bring parties initially before a court, and not of an originating summons. This was clearly wrong, the error being emphasised by the fact that the summons purports to be in a miscellaneous civil suit which did not, in fact, exist. Did this erroneous procedure result in the whole proceedings being a nullity as is urged by Mr. da Gama Rose? In my view the concept of treating something which has been done and acted upon as a nullity is a concept which should be used with the greatest caution. May I repeat some words I used in *Nanjibhai Prabhudas & Co. Ltd. v. The Standard Bank Ltd*., [1968] E.A. 670. I said in that case (at p. 683 B):

> "The courts should not treat any incorrect act as a nullity, with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature."

Using an incorrect form of procedure which has, in fact, brought the parties before the court and has, in fact, enabled the parties to present their respective cases to the court is not an incorrect act of such a fundamental nature that it should be treated as if it, and everything consequent upon it, did not exist and never had existed. The trial judge was wrong in not striking out the summons. His decision may well be challenged on appeal on the ground that he made a wrong order, but not on the ground that the order does not exist because it was made in proceedings which did not exist as they were a nullity.

The second point raises two matters, the first being whether the words "a beneficial interest" are a sufficient description of the interest claimed to come within the words "defined interest" in s. 57 (1) of the Registration of Titles Act (Cap. 281); and the second is whether a caveat, which on the face of it claims an interest in the whole of the registered property, but in fact a claim is made only to an unspecified part of that property, is a good caveat. I do not consider that the words "beneficial interest" are a sufficient description of the nature of the interest claimed as a person may have a "beneficial interest" in different types of interest in land. The Registrar ought to have refused to enter the caveat, but he in fact entered the caveat in that form. While this was an irregularity which would justify the judge in refusing to extend the period of the caveat, it is not, in my view, of so fundamental a nature as to treat the entry as a nullity, that is, as if it had never been made. As it is an irregularity it may be disregarded if it in fact occasioned no injustice.

The second aspect of the second point arises by reason of the fact that the caveat, on the face of it, relates to the whole of the property though it subsequently transpired that the caveator was claiming an interest only in part of the property and made no claim in respect of the remainder. In the result there is a caveat entered against property in respect of which there is no claim; and the wording of the caveat makes it impossible to ascertain even generally that part of the property in respect of which a claim exists from that part in respect of which no claim was made. Before a caveat can be entered against property a claim to an interest in the property must exist. In this case no claim exists as to part of the property, yet the caveat refers to the whole and prohibits any dealing with the whole. The result is that the entry of the caveat has prohibited dealing with property over which no claim is made. This surely is not merely an irregularity which can, in an appropriate case, be cured – it must be fundamental to the whole basis on which caveats are entered, and the rights

and duties which flow from the entry of a caveat. The fact that the position was only disclosed later is immaterial. There is no right to enter a caveat against property in respect of which no interest is claimed and if erroneously it is entered and the mistake subsequently comes to light, surely the entry must be struck out. As it is not possible to distinguish even generally that part of the property against which a claim is made from that part against which no claim is made, the entry of the caveat as a whole must be struck out. It is unnecessary in these proceedings to consider whether the entry was a nullity.

For these reasons I consider that the entry of the caveat should have been struck out, that the time should not have been extended and, consequently, that the appeal should be allowed. There will be an order in the terms proposed by Spry, J.A.

Sir Clement De Lestang V-P: The facts giving rise to this appeal are fully stated in the judgment of Spry, J.A., and I will not repeat them.

The first question for decision is what is the proper procedure for applying for an extension to a caveat lodged under s. 57 of the Registration of Titles Act? The application in the present case was made by "chamber summons" and intituled "Miscellaneous Civil Suit No. 82 of 1968".

Mr. da Gama Rose for the appellant contended that the proper procedure is by originating summons, whereas Mrs. Khanna for the respondent submitted that it is by chamber summons.

Section 57 (8) of the Registration of Titles Act requires the application to be made "by summons to the Court" without more. It is accordingly necessary to have recourse to the Civil Procedure Act and the rules made thereunder for guidance. A study of the Act and Rules shows that apart from summonses ad testificandum and duces tecum, which can have no bearing on the present problem, there are two kinds of summonses namely (*a*) summonses known as "chamber summonses" or "summonses in chambers" which are restricted to interlocutory proceedings in a pending suit or matter and (*b*) originating summonses which initiate certain specified proceedings prescribed by the Rules or, by virtue of s. 3 of the Civil Procedure Act, under any other law for the time being in force. As there was no pending proceeding in court when the application to extend the caveat was made in the present case, it seems to me that a chamber summons was not appropriate. Moreover, the application purports to be one in a suit when there is in fact no suit and Mrs. Khanna conceded that the title of the proceedings was wrong. If I am right in the view that a chamber summons is inappropriate, it follows that the proper procedure is by originating summons, the only other summons known to the Rules.

This brings me to the second question which is whether the proceedings in the High Court are a nullity or merely an irregularity which is curable under Rule 77 of the Eastern African Court of Appeal Rules 1954 and s. 100 of the Civil Procedure Act. It is not always easy to differentiate between a nullity and an irregularity. In *Macfoy v. United Africa Co. Ltd*., [1961] 3 All E.R. 1169, at p. 1773, Lord Denning delivering the opinion of the Privy Council said:

> "No court has ever attempted to lay down a decisive test for distinguishing between the two: but one test which is often useful is to suppose that the other side waived the flaw in the proceedings or took some fresh step after knowledge of it. Could he afterwards, in justice, complain of the flaw?"

Applying this test to the present case, I ask myself whether, if the appellant had not objected to the procedure in the court below, he could have applied to have the order set aside. I think not unless he could have shown that he had been prejudiced by the wrong procedure. As, however, the appellant was

able to argue his case fully in the court below and indeed has not raised on appeal any point which he had not argued in the court below, he was clearly not prejudiced by the erroneous procedure adopted by the respondent. It seems to me therefore that the proceedings were merely irregular and not null and void, and in the present circumstances this Court would not be justified in setting aside the order.

The last question is whether or not the caveat was valid. Mr. da Gama Rose contended that it was not on the ground that it did not comply with s. 57 (1) of the Registration of Titles Act and the prescribed form. Section 57 (1) in so far as it is material for the purposes of this case, provides that:

> "Any person claiming the right, whether contractual or otherwise, to obtain an interest in any land, that is to say some defined interest in such land capable of creation by an instrument registrable under this Act . . . may lodge a caveat with the Registrar of the registration district within which such land is situated forbidding the registration of any dealing with such land either absolutely . . ."

Section 57 (2) requires the caveat to be in a prescribed form.

The caveat lodged by the respondent purported to be in the prescribed form and in it the respondent claimed "a beneficial interest in Land Reference No. 8867 registered as No. IR 11836/1", that is to say in the whole of the appellant's land and forbade the registration of any dealing with the said land absolutely.

In support of his submission that the caveat was null and void Mr. da Gama Rose pointed out that for a person to be entitled to lodge a caveat under s. 57 (1) he must claim in the words of the section "some defined interest in such land capable of creation by an instrument registrable under this Act" and argued that a "beneficial interest" is not a defined interest as it is too vague and does not describe the nature of the interest. He also pointed out that while in the caveat lodged the claim relates to the whole of the appellant's land, yet it emerges from the application to the Court that it is merely in respect of an unidentified portion of it, and he submitted that the failure to describe the portion of land to which the respondent claimed an interest also contravened the requirement of s. 57 (1) that the interest should be defined.

Dealing with the second contention first it seems to me that the discrepancy between the extent of the claim in the caveat and in the proceedings would have been very material if there had been an appeal against the extension of the caveat on the merits. There is, however, no such appeal and Mr. da Gama Rose has expressly confirmed this. The position is that at the time the caveat was lodged, there was no discrepancy since on its face the caveat purported to apply to the whole of the land and therefore in so far as the extent of the claim is concerned, the caveat was in my view valid.

As regards Mr. da Gama Rose's first contention, I agree with it. The expression "a beneficial interest" means in my view an interest for one's own benefit and not as nominal or bare legal owner such as a trustee. There can be various interests in land and to claim merely an interest without stating the nature of this interest is not, in my view, a compliance with s. 57 (1) of the Act or of the prescribed form which requires the nature of the registrable interest to be stated. The caveat was accordingly defective in a material particular and ought not to have been accepted by the Registrar of Titles. For these reasons, I would allow this appeal. I agree with the order proposed by Spry, J.A.

Appeal allowed.

For the appellant:
M da Gama Rose
Shapley Barret Marsh & Co, Nairobi

For the respondent:
Mrs MB Khanna
Khanna & Khanna, Nairobi

Karia & Co Ltd v Dhanani
[1969] 1 EA 392 (CAN)

Division:	Court of Appeal of Nairobi
Date of judgment:	21 March 1969
Case Number:	45/1968 (50/69)
Before:	Sir Clement de Lestang V-P, Duffus and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Trevelyan, J

[1] Contract – Frustration – Sale of goods – Sale subject to licence – Whether cancellation of licence frustrates contract – What party attempting to rely on frustration must prove.

[2] Licensing – Export licensing – Cancellation of licence – By letter not signed by Minister – Whether licence validly cancelled – External Trade Act (*Cap*. 103) (*U*.).

[3] Sale of Goods – Delivery – Place of – Sellers unable to deliver as contracted due to cancellation of licence – Buyers instructing alternative place of delivery – Whether sellers bound to comply with new terms.

[4] Sale of Goods – Frustration – Sale subject to licence – Licence cancelled by order of Minister – Whether contract frustrated by cancellation of licence.

[5] Sale of Goods – Licence – Sale of beans subject to export licence – Duty to obtain licence on sellers.

Editor's Summary

The buyers in Kenya contracted on December 1, 1966, to buy 50 tons of Uganda mixed beans from the sellers f.o.r. Kampala, delivery to be during February/March 1967. At the time of contracting, the export of beans from Uganda was prohibited except on licence issued by the Minister for Commerce and Industry. On March 2, 1967, before delivery of the beans, the Ministry by letter cancelled all licences held by the sellers for the export of beans. The sellers, on March 10, wrote to the buyers informing them that, due to the cancellation of the licence, they could not rail the contracted 50 tons mixed beans and stated that in the circumstances they regarded the contract as cancelled. The buyers then cabled to the sellers asking them to deliver the contract goods to Messrs. Garden Fresh, Kampala, to whom the buyers stated they had sold the goods. The sellers refused to deliver the goods as requested and the buyers sued for damages for breach of contract. The judge in the lower court held that there was no frustration of the contract as the licences had not been validly cancelled; and he found in favour of the buyers. The sellers appealed and the buyers cross-appealed.

Held –

(i) the letter from the Ministry, although not signed by the Minister, validly cancelled the licence;

(ii) the sellers were entitled to refuse to deliver the goods to the address given in Kampala as that was not a term of the contract;

(iii) in the absence of an express provision in the contract, the duty to obtain an export licence was on the sellers;

(iv) the sellers had not done everything they could to obtain a setting aside of the cancellation of the licence and had therefore failed to prove that the contract had been frustrated;

(v) (per Duffus, J.A.) the cancellation of the contract by the sellers by letter of March 10 was a repudiation of performance of the contract and entitled the buyers, at that stage, to sue for damages for breach.

Appeal dismissed with costs and cross-appeal allowed with costs.

Cases referred to in judgment:

(1) *Maine Spinning Co. v. Sutcliffe & Co.*, [1916 – 1917] All E.R. Rep. 537.

(2) *Karachi Gas Co. Ltd. v. Issaq*, [1965] E.A. 42.

March 21, 1969. The following considered judgments were read:

Judgment

Sir Clement De Lestang V-P: The facts giving rise to this appeal are not in dispute and are the following. The appellants, whom I shall call the sellers, carry on business in Kampala, Uganda. The respondents, whom I shall call the buyers, carry on business at Thika, Kenya. On or about December 1, 1966, the sellers contracted to sell to the buyers 50 tons of Uganda mixed beans at Shs. 35/- per bag of 200 Ibs. gross f.o.r. Kampala, delivery to be during February/March 1967. At the time of the contract the exportation of beans from Uganda was prohibited except under licence issued by the Minister. On January 26, 1967, the buyers requested the sellers to consign the goods to Nairobi Station. On March 6 they changed their instructions and asked for the goods to be railed to Thika Station. Meanwhile, on March 2, the sellers, who held several export licences including one for the export of 50 tons of beans to Kenya, received a letter from the Ministry of Commerce and Industry, the relevant parts of which read as follows:

"Ref: S.TRE/41/02

MINISTRY OF COMMERCE AND INDUSTRY,

P.O. Box 2900,
KAMPALA, UGANDA.
2nd March, 1967.

Messrs. A. J. Karia & Co.,
P.O. Box 3127,
KAMPALA.
Gentlemen,

Cancellation of Licences Issued
to Cover the Export of Produce/Foodstuff

I am directed to cancel with effect from today, 2nd March, 1967, all unutilised licences issued for the export of produce/foodstuff from Uganda to any destination.

2. According to my records the licences detailed below had been issued to you in good faith. Please treat

them as cancelled.

[Then follows a list of licences]

3. This action is being taken as a precautionary measure to protect Uganda's food situation.

Yours faithfully,

[signed] J. S. Musoke

for PERMANENT SECRETARY

MINISTRY OF COMMERCE AND INDUSTRY."

On receipt of the letter, the sellers on March 10 wrote to the buyers informing them of the cancellation of their licences and said:

> "Under such circumstances, it is not possible for us to rail the contracted 50-tons Mixed Beans to you and there is no other way but to treat the said contract as cancelled."

On receiving that letter the buyers cabled to the sellers:

> "PLEASE DELIVER 50 TONS UGANDA MIXED BEANS CONTRACT 2645 TO GARDEN FRESH LTD. BOX 3647 KAMPALA AGAINST PAYMENT."

They followed their telegram with a letter in these terms:

> "*Re: 50 Tons Uganda Mixed Beans*
> *Contract 2645*
>
> In reply to your letter dated 10th March, 1967, regarding 50 tons of Uganda Mixed Beans, we would like to inform you that we have sold these to M/s Garden Fresh Ltd., P.O. Box 3647, Kampala at the price of Shs. 63/- per bag of 200 Ibs. gross for KAMPALA. We shall be most grateful if you would kindly deliver to M/s Garden Fresh Ltd. immediately."

The sellers refused to deliver the goods as instructed, whereupon the buyers instituted proceedings in Kenya in which they claimed damages for breach of contract owing to the sellers' failure to deliver the goods to the buyers or to their nominees at Kampala. The sellers resisted the suit on the ground that (1) by the revocation of the licences the contract became impossible of performance and was frustrated and (2) the buyers were not entitled under the contract to require the delivery in Kampala otherwise than f.o.r. Kampala. The learned trial judge, as I understand his judgment which, with respect, is far from clear, held that there was no frustration because it was not proved that the licences had been validly cancelled. He appears to have held that the buyers' instructions to the sellers to deliver the goods to Garden Fresh Ltd., Kampala, though incompatible with an f.o.r. contract, did not constitute a breach of contract. Anyway, he found in favour of the buyers. The sellers appealed and the buyers cross-appealed. The first question for decision is whether or not the letter of March 2, 1967, already quoted, validly cancelled the sellers' export licence. On this aspect of the case, the learned judge said "there was no cancellation for that which was purported lacked validity for no one but the Minister concerned could effect it". In other words he held that to be effective the cancellation must be under the hand of the Minister himself, which it was not. With respect, I am unable to agree. The letter has already been set out. It is clearly an official letter emanating from the Ministry of Commerce and Industry and signed by one Musoke on behalf of the Permanent Secretary of that Ministry. The writer purports to act on the direction of the Permanent Secretary. In my view any communication emanating from a Ministry must, at any rate until the contrary is proved, be taken to be the act of the Minister and to convey his decision. It is but common sense that a Minister cannot do everything personally. He must act through other officials of his Ministry, and this is what has been done here. The letter merely conveys the Minister's decision to cancel licences. The buyers admitted as much when their advocate in allowing the letter to go in at the trial, said "I accept the letter as being the official letter of the Uganda Government purporting to be what it is". I am of the view therefore that the licence was validly cancelled.

The next question is whether or not the contract was frustrated by the cancellation of the licence. It is contended for the sellers that, in an f.o.r. contract like the present one, it is the duty of the seller to transport the goods to the railway station, rail them and consign them to the destination nominated by the buyer, that in the present case the buyers were not entitled to have the goods delivered in Kampala or elsewhere except f.o.r. Kampala and consigned to the declared destination, and that consequently the sellers did not commit a breach of contract in refusing to comply with the buyers' instructions to deliver the goods to Garden Fresh Ltd. in Kampala.

For the buyers it is contended that there was no frustration because in the

absence of special provision in the contract, the sellers were either under an absolute liability to deliver the goods f.o.r. Kampala come what may, or under a duty to make every effort to obtain a licence which they did not do; that the instructions to deliver to Garden Fresh Ltd. in Kampala were in accordance with the contract and that the buyers were absolved from nominating any other place as the seller had signified their intention not to deliver anywhere in Uganda.

I think that the last contention can be disposed of in a few words. On March 17, 1967, the sellers informed the buyers by letter that they "could not deliver the goods in Uganda according to your instructions". The buyers' instructions were to deliver the goods to "Messrs. Garden Fresh Ltd. immediately against payment". This was not a term of the contract and the sellers were entirely within their rights to refuse to comply. The other letter in which the sellers informed the buyers that they were not bound to deliver in Uganda was written on April 14 long after the time for delivery had expired. It is accordingly irrelevant in these proceedings.

As regards the other contentions, I think that, with the exception of the two discussed below, those of the sellers are to be preferred. There is no dispute that in a f.o.r. contract it is a duty of the seller to deliver the goods at a named railway station and consign them to a destination nominated by the buyer. It is the duty of the buyer to declare a legal destination. In the present case the buyers did declare at least two destinations before the embargo was placed on the export of the goods and long before the time for delivery had elapsed. On being informed of the embargo, the buyers, instead of withdrawing the existing destination and declaring a legal one, instructed the sellers to deliver to Garden Fresh Ltd. at Kampala. This the buyers were not entitled to do as the contractual place of delivery was f.o.r. Kampala. A condition in a contract relating to the place of delivery enures for the benefit of both parties to the contract and cannot be waived by one party without the consent of the other. As Bailhache, J., said in *Maine Spinning Co. v. Sutcliffe & Co.*, [1916 – 17] All E.R. Rep. at page 539:

> "It is quite true, of course, that where a condition in a contract is wholly for the benefit of, and entirely for the benefit of, one of the parties to the contract, such a condition may be waived by the person for whose benefit, entirely and solely, it was inserted in the contract; but where one of the terms of the contract is the mode of delivery, it is not a condition which the other party may waive, but it is a part of the contract which has to be fulfilled by the seller making delivery at that particular place and the buyer receiving delivery there, and it is not a condition which is entirely for the benefit of either party to the contract, and neither party can waive it without the consent of the other."

It is argued for the buyers that the duty to obtain the necessary licence was on the sellers and that as the contract was not expressly made "subject to licence" the sellers were absolutely bound to perform the contract and in failing to do so were in breach. It is also contended that in any case the sellers had a duty to take all reasonable steps to obtain the licence and failed to do so.

There is nothing in the contract as to who was to obtain the licence, but having regard to the provisions of the External Trade Act and to the fact that it is the export that is licensed it seems to me that it was for the sellers to obtain the licence. Also from a common sense and practical point of view, it was much easier for the sellers to do so than for the buyers. I do not think, however, that because nothing was said about licences in the contract the liability of the sellers must be held to be absolute. The parties must have known in the present case from their previous dealings that a licence was necessary and it is significant

that the buyers, on being informed of the embargo, did not seek to hold the sellers absolutely liable but tried instead to change the mode of delivery.

As regards whether the sellers took any reasonable steps, there is no evidence that they did. In *Karachi Gas Co. Ltd. v. Issaq*, [1965] E.A. 42, a case in which the duty to obtain the necessary licence or permit was on the buyer and his plea of frustration failed, Sir Charles Newbold, P., said at page 54:

> "I am satisfied that under this contract there was a duty upon the buyer to take all reasonable steps to obtain these permits. In fact the permits were not obtained and the buyer has put forward as an excuse for the failure to obtain them the fact that if he had made the necessary applications prior to repudiating the contract he would not have obtained them. Where a person is under a duty to do something and he fails to do it and he puts forward as an excuse for such failure the fact that if he had sought to do it he would not, for reasons beyond his control, have succeeded, then a heavy onus is cast on him to explain his failure. On the facts of this case the buyer had failed to apply for the necessary permits and the only way in which he can excuse that failure is if he can satisfy the court that any application for such permits would have been 'foredoomed to failure'."

It was argued on behalf of the sellers that as this was a case of cancellation as opposed to one of refusal of a licence and as the buyers acted as if the contract to export was off, it was not necessary for them to do more. I am unable to agree. The licence was cancelled on March 2, 1967, and the reason for cancellation was to protect Uganda's food situation. This suggests a temporary embargo only. Indeed it did not last for long as on April 20, 1967, the sellers exported to other buyers in Kenya 140 bags of mixed beans. In the circumstances it is impossible to say that any representation which the sellers could have made to the Minister was foredoomed to failure. It is interesting to note that at the time of delivery the price of beans had nearly doubled, and one cannot help thinking that, having made a disastrous bargain, the sellers were quite content to do nothing hoping to be relieved of their obligation under the contract. Indeed, their first reaction was to treat the contract as cancelled. That being the position, the sellers failed in my view to prove frustration of the contract.

I would accordingly dismiss the appeal. The cross-appeal was argued together with the appeal and succeeds on one ground only, viz. the very ground on which the appeal failed. In these circumstances I would dismiss the appeal with costs and allow the cross-appeal also with costs subject to there being one bill of costs only.

Duffus JA: I have had the advantage of reading the judgment of the learned Vice-President which fully sets out the facts in this appeal.

The relevant contract provided for the delivery of 50 tons of Uganda mixed beans f.o.r. Kampala during the months of February/March, 1967. The exportation of beans from Uganda is prohibited by the External Trade Act (Cap. 103 of the Laws of Uganda) except under an Export Licence issued by the Minister of Commerce and Industry. The appellant company, the sellers of the beans, then had the necessary export licence, but due to a food shortage in Uganda this export licence was cancelled as set out in the letter from the Permanent Secretary of the Ministry dated March 2, 1967. The trial judge found that the cancellation had not been satisfactorily proved, but I entirely agree with the Vice-President that the evidence before the trial court clearly established that the export licence had in fact been validly cancelled. The contract for sale provided for the delivery of the beans f.o.r. Kampala and the contract could therefore have been performed by the delivery of beans at the Kampala Railway Station for delivery to a destination within Uganda.

The appellant company, however, apparently regarded the contract as one providing only for the export of beans from Uganda and accordingly by its letter registered to the respondent buyers on March 11, 1967, the company, after referring to the prohibition of the export of all types of produce from Uganda and to the cancellation of all export licences, stated that in these circumstances it treated the contract with the respondents as cancelled. The cancellation of the contract was at this stage premature as (i) the contract could still have been performed by the delivery of the beans in Uganda; and (ii) it was, as the learned Vice-President has pointed out, the duty of the seller to try and obtain an export licence and there was still time for such a licence to have been obtained, the cancellation of export licences appeared to have been only a precautionary and temporary measure intended to protect a local food shortage and in fact there is evidence that the appellant company obtained a new export licence the following month.

The cancellation of the contract by the appellant company's letter of March 11, 1967, amounted to a wrongful repudiation of the contract and the respondent buyers could have immediately treated this as a breach of contract and sued for damages. The respondents, however, elected to treat the contract as being still in existence and attempted to have delivery of the beans made in Uganda. They did this by their telegram of March 13 followed by their letter of March 14, 1967, asking for delivery to be made to Messrs. Garden Fresh Ltd. in Kampala. The appellant company replied by its letter registered on March 18, 1967, stating *inter alia*:

> "and regret to inform you that we cannot deliver the goods in Uganda according to your instructions."

The meaning of this sentence is not clear. It could mean either (*a*) a definite refusal to deliver the beans in Uganda, or (*b*) refusal to deliver the beans according to the instructions of the respondents, that is to deliver to Garden Fresh Ltd. in Kampala.

On this latter point the argument is that the delivery must be made to the railway and not to some other address in Kampala. If this was the meaning intended by the appellant company then I would have expected the company to point this out in its letter or to ask for further directions; however, on referring to the further correspondence between the parties and also to the evidence of one of the directors of the appellant company at the trial, it appears clear that the meaning intended was that of a definite refusal to deliver the beans in Uganda and this was the meaning understood by the parties. I would refer here in particular to the appellant company's letter of April 14, 1967, in reply to the letter from the respondents' advocate dated April 7, 1967.

I agree that the appellant company have failed to establish that the contract was frustrated in that the company made no attempt to obtain a new export licence. Apart from this it is my view that the refusal to effect delivery in Uganda when taken together with the statement in the appellant company's letter of March 11, 1967, that the contract was cancelled, amounted to a definite repudiation of the contract such as entitles the respondents to damages for breach of contract as claimed in this suit.

I agree therefore with De Lestang, V.-P., that the appeal be dismissed and the cross-appeal allowed and also with his proposed order for costs.

Law JA: I have read the judgment prepared by the learned Vice-President. I agree with it in every respect, and I concur with the order proposed.

Appeal dismissed. Cross-appeal allowed.

For the appellant:
PJ Wilkinson, QC and *EP Nowrojee*

Nowrojee & Nowrojee, Nairobi

For the respondent:
RR Shah
Shah & Shah, Nairobi

Ouma v Republic
[1969] 1 EA 398 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	27 February 1969
Case Number:	131/1968 (51/69)
Before:	Sir Charles Newbold P, Sir Clement de Lestang V-P and Spry JA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Simpson, J

[1] Criminal Practice and Procedure – Alteration of conviction – Whether more serious offence can be substituted – Aggravation of stealing – Proper procedure to be followed – Penal Code (*Cap.* 63), *s.* 285*; Criminal Procedure Code* (*Cap.* 75), *ss.* 137 (*h*) *and* 179 (*K.*).

[2] Criminal Practice and Procedure – Sentence – Enhancement of – Aggravated stealing – Substitution of offence and increase of sentence – Procedure to be followed – Penal Code (*Cap.* 63), *s.* 285 *– Criminal Procedure Code* (*Cap.* 75), *ss.* 137 (*h*) *and* 179 (*K.*).

Editor's Summary

Sections 275 and 285 of the Penal Code and s. 137 (*h*) of the Criminal Procedure Code must all be read together; their joint effect is that a person cannot be punished under s. 285 unless he has been charged not only with the current offence but also with having previously been convicted.

Order of Court below set aside.

No cases referred to in judgment

Judgment

Spry JA: read the following considered judgment of the Court: The appellant was charged in the court of the District Magistrate at Naivasha under s. 275 of the Penal Code with the offence of stealing a pair of trousers. He pleaded not guilty but at the end of his trial he was found guilty and was convicted of the offence charged. After the appellant had admitted nineteen previous convictions, the District Magistrate expressed the opinion that the maximum sentence he had power to impose would be inadequate and

committed him to the High Court for sentence.

At the hearing before the High Court, the appellant again admitted his previous convictions and the prosecutor is recorded as having asked the learned judge to alter the conviction from one under s. 275 to one under s. 285. This the learned judge purported to do, and he sentenced the appellant to seven years' imprisonment to be followed by five years' police supervision.

With respect, this purported alteration of the conviction was improper. Section 285 of the Penal Code does not itself create any offence. It is one of a number of sections which provide that certain circumstances aggravate the offence of stealing; it reads as follows:

> "If the offender, before committing the theft, had been convicted of a theft punishable under any of sections 275 to 284 inclusive of this Code, he is liable to imprisonment for seven years."

Furthermore, apart from certain express provisions which are not relevant, the High Court only has power under s. 179 of the Criminal Procedure Code

to substitute a conviction for a minor offence which is of a cognate nature; here, the purported substitution was for a more serious offence.

Mr. Hobbs, who appeared for the Republic, conceded that the conviction should have been left unchanged and he asked us to restore the conviction passed by the District Magistrate, while maintaining the sentence passed by the learned judge.

There is, however, a further difficulty. Section 137 of the Criminal Procedure Code contains provisions which apply to all charges and information's and these include the following paragraph:

> "(*h*) where a previous conviction of an offence is charged in a charge or information, it shall be charged at the end of the charge or information by means of a statement that the accused person has been previously convicted of that offence at a certain time and place without stating the particulars of the offence."

The Second Schedule to the Code contains, as Form No. 23, the form of statement to be appended to the charge.

Mr. Hobbs conceded that these provisions apply to cases where it is intended that the accused person should be punished under s. 285, and that they were not complied with in the present case; but he submitted that the failure to comply with them was a curable irregularity and had in fact occasioned no failure of justice.

With respect, we cannot agree. We think that ss. 275 and 285 of the Penal Code and s. 137 (*h*) of the Criminal Procedure Code must all be read together; that their joint effect is that a person cannot be punished under s. 285 unless he has been charged, not only with the current offence, but also with having previously been convicted.

The appellant was charged under s. 275 only; he pleaded to that charge and was convicted on it and, in our view, he could only be sentenced on it. The maximum sentence that could lawfully be passed was, therefore, one of three years' imprisonment.

We accordingly set aside the order of the learned judge purporting to alter the conviction and restore the conviction, under s. 275 of the Penal Code, passed by the District Magistrate. We set aside the sentence of seven years' imprisonment imposed by the learned judge and substitute a sentence of three years' imprisonment. The order for police supervision will remain.

Order accordingly.

The appellant did not appear and was not represented.

For the respondent:
JR Hobbs (Deputy Public Prosecutor, Kenya)
Attorney-General, Kenya

Bruno and others v Uganda
[1969] 1 EA 400 (CAK)

Division: Court of Appeal at Kampala

Date of judgment:	12 March 1969
Case Number:	Kam 7/1969 (52/69)
Before:	Duffus, Spry and Law JJA
Sourced by:	LawAfrica

[1] Appeal – Extension of time for giving notice of – Application for – Whether both Court of Appeal and High Court of Uganda have jurisdiction to extend time for giving notice of intention to appeal – Judicature Act 1967, *ss.* 37 *and* 43*; Eastern African Court of Appeal Rules* 1954, *r.* 9.

Editor's Summary

Both the Court of Appeal and the High Court of Uganda have jurisdiction to extend the time for giving notice of appeal. But application must be made first to the High Court.

Application struck out.

No cases referred to in judgment

Judgment

March 12, 1969. The following considered judgment of the Court was read by **Spry JA:** This is an application for an extension of time to give notice of appeal. Mr. Sekandi, who appeared for the State, raised the question whether such an application lies to this Court. We are indebted to him for drawing our attention to this point and for his argument.

Mr. Sekandi began by referring us to s. 328A of the Criminal Procedure Code Act but on consideration we think that section, in common with the other sections under the heading "Appeals from Courts", only relates to appeals from magistrates' courts.

Mr. Sekandi then referred us to s. 37 of the Judicature Act 1967, which confers on the High Court jurisdiction (*inter alia*) to extend the time for giving notice of intention to appeal from its judgments. The question is whether that jurisdiction is exclusive.

Rule 9 of the Eastern African Court of Appeal Rules 1954 confers on this Court power "to extend time for . . . bringing any appeal" and the bringing of an appeal is, under r. 30, the giving of notice. The rules were expressly saved by s. 43 of the Judicature Act 1967.

We do not consider that r. 9 was impliedly varied by the enactment of s. 37 of the Judicature Act 1967, and we think that the present position is that both this Court, under r. 9, and the High Court, under s. 37, have jurisdiction to extend the time for giving notice of intention to appeal.

If this is so, however, r. 18 of the Eastern African Court of Appeal Rules 1954 applies. That rule provides that when any application may be made to this Court or to a Superior Court, "it shall be made in the first instance to the Superior Court".

It would not appear that any application has been made to the High Court, and it follows that we should not entertain this application. It is accordingly struck out.

Application struck out.

For the respondent:
F Sekandi (State Attorney, Uganda)
Attorney-General, Uganda

Khimji v Essaji and others
[1969] 1 EA 401 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	3 December 1968
Case Number:	24/1968 (53/69)
Before:	Georges CJ
Sourced by:	LawAfrica

[1] Rent Restriction – Variation of order – Application for discharge, rescission or variation of order – Order made by consent – Parties represented by counsel at hearing – Whether consent order can be varied – Principles to be applied – Rent Restriction Act (*Cap.* 479), *s.* 19 (5) (*T.*).

Editor's Summary

The tenant applied under s. 19 (5) of the Rent Restriction Act for the discharge, rescission or variation of an order made by consent ordering them to deliver up possession to the landlord of certain rent controlled premises. The magistrate having refused the application, the tenant brought this appeal to the High Court.

Held –

(i) an order for possession made by consent should only rarely be rescinded or varied where both parties were represented by counsel at the hearing; there must be a change of circumstances which could not have been envisaged at the time of the making of the original order;

(ii) on the facts, the magistrate had exercised his discretion correctly in refusing the application.

Appeal dismissed with costs.

Cases referred to in judgment:

(1) *Khantibhai Patel v. Gulamhussein Brothers* (1968) (Tanzania High Court Miscellaneous Civil Appeal No. 12 of 1968) (unreported).

Judgment

Georges CJ: On October 19, 1966 the respondents, the landlords, filed a plaint against the applicant, the tenant, claiming vacant possession of part of the ground floor of premises at the corner of India Street and Morogoro Road which the applicant held of them as a monthly tenant at a rent of Shs. 468/25. Rent

in arrears then due was Shs. 2,382/50. The tenant filed a defence alleging that the action was bad in law as all proper defendants had not been sued and questioning the correctness of the rent claimed. The premises were not then subject to rent restriction and there were no bars to possession.

On November 27, 1966 the premises became controlled as a result of an amendment to the Rent Restriction Act. The action duly came on for hearing on the preliminary point as to parties which went against the tenant. Eventually on June 7, 1967 judgment for the landlords was recorded by consent. The tenant was ordered to deliver vacant possession by March 31, 1968. The rent falling due was to be paid at the end of every month and the amount then due was to be paid on June 15, 1967. In default of compliance with these conditions vacant possession was to “become due forthwith”.

On April 1, 1968 the tenant lodged this application that the consent order be discharged or rescinded or varied under s. 19 (5) of the Rent Restriction Act (Cap. 479). His affidavit in support alleged that he could find no suitable

premises in the town to which to move his business and that he and his partners with a combined family of thirteen to maintain would “loose their livelyhood” (sic) if the order were enforced. He claimed that the landlords did not need the premises as they had other business premises in the town.

The landlords replied claiming that the business premises which they occupied were inadequate to their needs, that the tenant’s business carried on from the premises was small and that he had been consistently in arrears in payment of his rent. They stated that the tenant had not paid his rent in the terms of the consent order and that it was not until April 1968 that he had sent a cheque for eleven months rent then in arrears. That cheque was returned unpaid but another dated May 8 was honoured.

In an affidavit in reply the tenant did not deny irregularity in payment of rent but blamed the returned cheque on an advocate’s mistake in not checking to make sure that the figures and letters on the cheque agreed.

The matter came up for hearing before the learned Senior Resident Magistrate, Dar-es-Salaam. Neither side applied to have evidence taken nor to cross-examine the other on the affidavits filed. There was argument on the affidavits.

The learned Senior Resident Magistrate ruled that the application was made solely on humanitarian grounds – the hardship which the tenant would suffer because he could get no alternative accommodation. He pointed out that the order had been made by consent and the tenant should not now go back on his undertaking.

Before going into the merits of this application, I should observe that magistrates should not record consent orders for possession under the Rent Restriction Act unless they are satisfied that some ground set out under the ordinance has been made out, and, in the cases where this applies, that it is reasonable to make the order. This does not necessarily entail the hearing of evidence. The tenant can admit the existence of the ground and he can also admit facts, where this may be necessary, to show that the making of the order was reasonable. If this is done it will be of considerable assistance if there should later be an application for a rescission or variation, as the grounds on which the parties acted will be clearly set out in the record.

I now turn to the merits. Counsel for the tenant criticises the judgment for failing to evaluate the case made by his client. He states that in effect the magistrate was saying that the order should not be varied because it was by consent. Clearly if the learned Senior Resident Magistrate had said this he would be wrong. But I do not think he said this. What he did was to consider the grounds sought to be established by the tenant which he described as “humanitarian”, contrasted those with the agreement previously reached, and concluded that there was no reason for disturbing the agreement. The choice of language can sometimes be criticised, as for example the sentence “I am not persuaded that this application merits consideration”. The fact is, however, that it was considered, as can be seen from the fact that this sentence is followed by the remark “particularly when it is recalled that the applicant has had more than ample time to make alternative accommodation arrangements”.

For my part I would say that it should only be rarely that an order for possession made by consent should be rescinded or varied where both parties were represented by counsel at the hearing. As was said by Hamlyn, J. in *Patel v. Gulamhussein Brothers* (Miscellaneous Civil Appeal No. 12 of 1968 at Dar-es-Salaam, August 1968) (unreported) there must be:

> “a change of circumstances which could not have been envisaged at the time of the making of the original order”.

For example, the tenant may have made firm arrangements for obtaining vacant possession of other premises and his plans may have fallen through because of no fault of his own. If, however, a tenant agrees to give vacant possession having himself no idea where he intends to move but merely hoping to find somewhere, he can hardly be heard to plead absence of alternative accommodation as a ground for a rescission.

Further, on the facts of the case, the tenant has clearly been irregular in paying his rent. He now offers a guarantor but clearly no landlord should be asked to put up with such an arrangement.

I think that on the facts before him the magistrate exercised his discretion correctly. Even if I had disagreed with the manner of the exercise I could not change it unless it was clear that he had misdirected himself. He has not done so.

Accordingly the appeal is dismissed with costs.

Appeal dismissed.

For the appellant:
NS Patel
Patel & Co, Dar-es-Salaam

For the respondent:
AA Lakha
Fraser Murray, Roden & Co, Dar-es-Salaam

National and Grindlays Bank Ltd v Patel and others
[1969] 1 EA 403 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	11 March 1969
Case Number:	362/1965 (54/69)
Before:	Dickson J
Sourced by:	LawAfrica

[1] Conspiracy – Burden of proof – On party who alleges the tort.

[2] Conspiracy – Furthering own interests – If incidentally damaging to a third party not actionable.

[3] Guarantee – Discharge – Variation – Bank opening new account – Under name of guarantors' successors – Whether a variation of agreement.

[4] Guarantee – Discharge – Variation – Consent given in guarantee to vary the terms of the guarantee – Such a variation did not terminate the guarantee.

[5] Negligence – Duty of care – Bank and guarantor of customer's overdraft – No duty of care owed by bank to guarantor.

Editor's Summary

The first three defendants were directors of the fourth defendant company, Patel Ltd., and they were appointed managing agents of a company, Luvule Coffee Hullers Ltd., to run its factory. The company required money during the coffee buying season to finance its purchases of coffee from the growers, and it arranged for an overdraft from the plaintiff bank. The bank secured its loan by a debenture from the company which was guaranteed jointly and severally by the defendants by letters of guarantee to the bank. The managing agency of the defendants was terminated by the company, and at that time the company owed money to the bank. There were stocks of coffee purchased before the termination of the agency and after "hulling" the proceeds of sale of these stocks were credited to the company's account with the bank. The bank claimed that the defendants had returned to the factory after the termination of their agency to supervise the "hulling" of these stocks of coffee in hand in

order to ensure that the proceeds of sale should be credited to the bank and thus decrease the financial responsibility of the defendants. Although the bank held security from the company itself in the form of a charge on its factory, the factory was not saleable and the overdrafts were given by virtue of the guarantees given by the defendants. The guarantees by their terms were to remain in force until the guarantors should give notice to the bank of their intention not to be bound by them but no such notice was in fact given. On July 4, 1964, after the termination of the agency, the bank wrote to the company demanding payment of the money, but no repayment was made. The bank sued the defendants for the amount owed to it by the company after crediting the proceeds of sale of the coffee hulled under their supervision. The defendants argued that they were discharged from their guarantees by the act of the bank in opening a fresh account for the company in the name of the defendants' successors as managing agents, and in giving further credit to the company without obtaining the consent of the defendants. The guarantees contained clauses to the effect that they were to be continuing guarantees and that the bank was entitled to open fresh accounts in the event of the guarantees ceasing to be binding on any of the guarantors. The bank was also to be at liberty, without affecting its rights under the guarantees, to determine or vary the amount of any credit given to the debtor. The defendants also pleaded that in consideration of the fourth defendant agreeing to refrain from obstructing the new managing agents in any way, the bank agreed that the defendants should not be liable under the guarantees in respect of any money subsequent to the date of termination of their agency. The defendants further pleaded that the bank's manager had conspired with the company to terminate the managing agency of the defendants and, as a result, the defendants had suffered damage. The defendants also pleaded that the bank was negligent in not appointing a receiver and manager immediately on termination of the defendant's agency and that, as a result of this breach of duty, the defendants' liability was not reduced; and further that the bank had advanced money to the defendants' successors as managing agents without adequate security and allowed them to operate when not approved under the Coffee Act.

Held –

(i) the bank was at liberty, without affecting its rights under the guarantees to vary the amounts of credit to the debtor, as consent to this had already been obtained in the guarantees (*National Bank of Nigeria Ltd. v. Awolesi* (1) and *Harilal and Co. v. Standard Bank Ltd*. (2) distinguished);

(ii) on the facts, by the conduct of the parties, the guarantees ceased to have effect from the date of the termination of the defendants' agency; the terms of the guarantees then came into force and the bank had specific powers to open a new account;

(iii) in a case of conspiracy, the burden of proving both the combination and the purpose of damaging is on the party who alleges the tort;

(iv) if an agreement is to further one's own interests even if it incidentally damages a third party, it is not actionable; and the bank in this case acted in the interests of the company and the bank (the *Crofter Harris Tweed Co*. case (3) adopted);

(v) the bank owed no duty of care to the guarantors; and there was no negligence on the part of the bank.

Judgment for the plaintiff with interest and costs.

Cases referred to in judgment:

(1) *National Bank of Nigeria Ltd. v. Awolesi*, [1964] 1 W.L.R. 1311.

(2) *Harilal and Co. and Another v. Standard Bank Ltd*., [1967] E.A. 512.

(3) *Crofter Harris Tweed Co. v. Veitch*, [1942] 1 All E.R. 142.

(4) *Hedley Byrne Co. Ltd. v. Heller Partners Ltd.*, [1963] 2 All E.R. 575.

Judgment

Dickson J: At the commencement of the hearing of this suit, Mr. Keeble, counsel for the plaintiffs, asked that the suit be discontinued, without prejudice, against the first defendant, and it was accordingly ordered.

It appears that all the first three defendants are members of the same family and are directors of the fourth defendant company. It is not disputed that the defendants were appointed managing agents of Luvule Coffee Hullers Ltd. (hereinafter referred to as "Luvule"), a limited liability company, incorporated in Uganda. The defendants had to run the factory of Luvule subject to the directors. It is not disputed that all the directors and shareholders of Luvule are Africans. It would seem that Luvule, during the coffee buying season, required a large amount of money, for the purpose of purchasing coffee from the growers, which was to be processed by the former. In order to have the money available, Luvule arranged for banking facilities with the plaintiffs.

The plaintiffs were secured, vis à vis Luvule, by a debenture issued by Luvule. The defendants guaranteed jointly and severally all the amounts owing to the plaintiffs by Luvule. The guarantees are four in all, and they are together tendered as Exhibit P1. I might at this juncture indicate that these documents constitute a vital facet to this suit. The first guarantee is dated August 7, 1959, and is signed by the first, second and third defendants; and it is agreed that it was not made on behalf of the fourth defendant – that it was given to the plaintiff bank by the signatories in their individual and joint capacities. It is also not disputed that the guarantees dated respectively July 9, 1962 and January 14, 1963 (referred to during the proceedings as the second and fourth guarantees) are made on behalf of the defendant company; and that a further guarantee dated January 14, 1963 (referred to as the third guarantee) is given on behalf of the first and second defendants, and are signed by them. Each of the guarantees are virtually in the form of a letter to the plaintiff bank. The limit of the sum in the guarantees of August 7, 1959 and July 9, 1962 is Shs. 1,500,000; and each of the remaining two, Shs. 2,500,000.

On June 27, 1964 the managing agency which the defendants had with Luvule was terminated by Luvule and they were succeeded by African Coffee Auctioneers & Brokers Ltd. to be the managing agents. At the termination of the defendants' managing agency, there was an amount owing by Luvule to the plaintiff, and there were also in hand at the factory certain stocks of coffee which had been purchased prior to the termination of the defendants' managing agency. Those stocks of coffee were "hulled", and the ultimate proceeds of sales were credited to the accounts of Luvule, which had been maintained at the plaintiff bank, prior to the determination of the managing agency. It appears that, almost simultaneously, various debits were made to the account, for, after the determination of the managing agency. Luvule continued to operate; and it did so with additional money provided by the plaintiff against the debenture, but through accounts different from those which had been maintained during the defendants' managing agency. It is of importance to observe that the plaintiffs are claiming only the amount which is owed by Luvule in respect of the operations carried out during the defendants' agency. In his final address, Mr. Keeble said that the plaintiffs were abandoning its claim for Shs. 18,990/20 and was claiming Shs. 227,981/- and not Shs. 246,971/61 as stated in the plaint.

I have no difficulty in finding on the evidence, despite what the defence says,

that credits – proceeds from coffee amounting to Shs. 218,747/-, which had been purchased and were in stock on hand, prior to the termination of the defendants' agency – were credited to the accounts of Luvule, which Luvule kept at the bank. I am satisfied that those stocks of coffee were hulled out to the knowledge of the defendants. I am also satisfied that almost at the same time certain debits were made. As I see it, the plaintiff is not claiming the sum which was in fact showed owing in the books of the bank on June 27, 1964, but the amount which became owing after these various debits and credits had been applied to those accounts. In the result, the plaintiff is not claiming to enforce its full rights against the defendants, but is attempting to recover from the defendants the amount due to it consequent upon the termination of their managing agency, and none other. This was made clear during the hearing by Mr. John Duffus, the manager of the plaintiff's branch at Masaka. I have observed and heard Mr. Duffus, and I accept his evidence when he says:

> "It is the attitude of the bank that we waive our strict rights of the guarantee, and seek enforcement for the amount now claimed."

I also accept his evidence when he says that after the termination of the defendants' agency, he saw the defendants or their representatives supervising the "hulling out", and that they were there to see that the coffee coming out was in fact credited to them and that their presence was acquiesced in by Luvule and himself. He goes on to say that they were supervising coffee worth Shs. 218,747/-, which they wanted to be credited in order to reduce their guarantee; and the bank's idea was that as cash was drawn from that account, the proceeds from the coffee should go back into the account from which the money was originally borrowed. He continues:

> "The defendants came in and signed two cheques I have just mentioned, by arrangement (Ex. P5) dated 24/8/67 and 27/8/67 respectively for Shs. 590/30 and Shs. 1,407/37. Those dates are after the dates of the hulled out coffee. The defendants knew very well that after the hulling out the factory was being carried on with additional funds . . . It was my impression that their interest in the hulling out after the cessation of their agency was to see that their financial liability was crystallised at the date of termination following consequential payments."

Reverting to the debenture which is in fact three documents, Mr. Duffus in examination-in-chief said that the bank held security from Luvule itself – a debenture and also a charge on the property – a factory building. He went on to say (and so it is), that the debenture consists of three documents: the first is dated March 10, 1959, a supplementary dated August 7, 1959, and a third dated January 14, 1963, in the aggregate Shs. 2,500,000. In cross-examination by Mr. Dalal for the defendants, he repeated that the debenture totalled 2½ million shillings used to purchase coffee, and that the factory would be worth Shs. 400,000/- which is not saleable, and with that I agree. Further in cross-examination he says that he gave overdrafts to Luvule by virtue of the guarantees given by the managing agents (the defendants) up to June 27, 1964, the defendants or the group were managing agents for about four coffee companies and on that date all the companies terminated their managing agencies; and it was not true to suggest that the terminations were done at his, the witness's, instigation.

After the managing agency of the defendants was terminated, Mr. Duffus wrote a letter to Luvule, dated July 4, 1964, demanding repayment of advances. No payment was received. Now, in all the guarantees, except that of August 7, 1959, there is a clause to the effect that the guarantee was to continue in force

until such time as the guarantors gave notice (one month's) to the bank of their intention not to be bound by the guarantee, after the expiry of the month's notice. Suffice to say, no notice has ever been given. I might at this stage say that the guarantee of August 7, 1959 is different in content to the others, but the others are all the same.

Mr. Duffus in his evidence says that, not having received any notice from the defendants, he thought that they were responsible for the whole amount. In his opening address Mr. Keeble submitted that, no notice having been given, accordingly, on the face of things, the guarantees are still valid up to that very moment in respect of money given by the plaintiffs.

In paragraph 1 of their statement of defence, the defendants aver that the plaintiff's suit is premature, in that they did not make any demand for payment from Luvule before filing the present action against the defendants. It suffices to say that there is clear evidence as per the letter that a demand was made on Luvule.

In paragraph 2 of their defence the defendants plead as follows:

> "IN FURTHER OR ALTERNATIVE, the Defendants state that they are discharged under the guarantee by the act of the Plaintiff in opening fresh account of 'Luvule' known as 'African Agency Account' and opening various other Accounts, and giving further credit to 'Luvule' without the Defendants' consent and depriving the Defendants benefit of deposits made in 'African Agency Account' and other Accounts."

It behoves the Court to examine the guarantees. As has already been pointed out, the 1959 guarantee is different from the others in wording and it is signed by the first, second and third defendants. The third defendant has not signed any of the subsequent guarantees. It has been correctly pointed out by Mr. Dalal that the first guarantee dated August 7, 1959 is a simple document and does not require argument. It falls upon me to construe the remaining guarantees. That being so, it is prudent to set out paragraphs 3 to 5 of the second guarantee (dated July 9, 1962). The remaining guarantees also contain identical paragraphs:

> "This Guarantee is to be in addition and without prejudice to any other securities or guarantees which you may now or hereafter hold from or on account of the Debtor and is to be binding on the Undersigned as a continuing security notwithstanding any settlement of account or the Undersigned or any of them (if more than one) being under disability or dying until the expiration of one month from the time when you shall receive notice in writing to the contrary from the Undersigned or the personal representatives of the Undersigned.
>
> This Guarantee is to be binding as a continuing security on the others or other of the Undersigned (if more than one) notwithstanding that it may have ceased to be so binding on any one or more of them by reason of any such notice as aforesaid to the contrary or disability bankruptcy release or otherwise howsoever.
>
> You are to be at liberty in the event of this Guarantee ceasing from any cause whatsoever to be binding as a continuing security on the Undersigned or any of them (if more than one) to open a fresh account or accounts with the Debtor and no moneys paid from time to time into any such account or accounts by or on behalf or to the credit of the Debtor shall on a settlement of any claim under this Guarantee be appropriated towards or have the effect of payment of any part of the moneys due from or owing by the Debtor at the time of this Guarantee ceasing to be so binding as

> aforesaid unless the person paying in such moneys shall at the time direct you in writing specially to appropriate the same to that purpose."

Mr. Dalal submits that the guarantees are to be construed very strictly, because the liability is not a primary one, but a secondary liability, and generally one gets at the principal first, and if unsuccessful one tries to recover from the guarantor. He refers to paragraph 2 which reads:

> "This Guarantee is to be a continuing security for the whole amount now due or owing to you or which may hereafter from time to time until the expiration of the notice hereinafter mentioned become due or owing to you by the Debtor and remain unpaid but nevertheless the total amount recoverable hereon shall not exceed shillings one million five hundred thousand together with interest thereon at your then current rate from the date of your demand until payment."

He submits that the remaining three guarantees are by virtue of the phrase "continuing security" to be construed as continuing guarantees and do not cease to be such, and can only be determined (*a*) by giving notice to the bank; (*b*) if the guarantor is dead; (*c*) if the guarantor is under disability. He contends that the reference to opening a fresh account in paragraph 5 is limited to notice being given to the bank; death; or disability. He submits that the phrase "ceasing from any cause whatsoever" means the events mentioned above, namely (*a*), (*b*), and (*c*).

The issue here is whether the guarantees are continuing or ceased to be so. It is conceded that no notice was given by the guarantors. Mr. Dalal submits that by opening a new account the guarantors are discharged and he cites two decisions in support of his contention. The first is *National Bank of Nigeria Ltd. v. Awolesi*, [1964] 1 W.L.R. 1311. It was held in that case that, on its true construction, the guarantee was of the account as it existed at the date when the guarantee was made, and the parties did not contemplate the opening of a second account; and that, by permitting the opening of the second account; the bank had permitted a substantial variation of the terms of the contract without the defendant's knowledge and to his detriment. The defendant, therefore, was discharged from his guarantee. It was further held that, even were the guarantee to be construed as covering all three accounts, since they had not been operated as one account, whereby the principal sum guaranteed would have been reduced, but had been operated in such a way as to increase the burden on the defendant, the defendant was discharged from his guarantee. The second case is *Harilal & Co. v. Standard Bank Ltd*., [1967] E.A. 512. In that case, the facts, it was said, were remarkably similar to the facts in *National Bank of Nigeria v. Awolesi* (*supra*). The East African Court of Appeal held *inter alia* (per curiam) in *Harilal's* case that the opening of the No. 2 account with-out the consent of the guarantor discharged the guarantor from all liability under the guarantee (the effect of this variation on the antecedent transactions not having been raised).

As was pointed out by Mr. Keeble in his final address, it is trite law that if a creditor, without the consent of the guarantor, makes some material alteration to his arrangements with the debtor, the guarantee is discharged. He goes on to say that what is or is not a material alteration is a question of fact, and he submits that one thing is clear even in a case where there is a material alteration in the creditor and debtor relationship, the guarantor is not discharged, if he consents; and that a guarantor can consent in advance. In other words, he can say to the creditor "you can act carte blanche in any way you wish", and that is exactly what the guarantees do in the instant case.

In *National Bank of Nigeria Ltd. v. Awolesi* at p. 1315, Lord Hodson, in

giving his opinion, stated the question for consideration, which depends in the main of the construction of the document of guarantee itself, is whether the majority of the Federal Supreme Court were right in arriving at the conclusion that in the events which had happened the respondent was discharged from his responsibility as guarantor. Pausing here awhile, in my view the guarantees in the instant case are quite different to the *National Bank's* case and that of *Harilal*. Lord Hodson went on to say that the guarantee refers to "the continuing of the existing account" as consideration for the guarantee, which suggests that the parties had agreed that the account of the principal debtor existing on December 30, 1955 should be continued in a broken state and that they did not contemplate the opening of a second account. In the two cases referred to above, the guarantees clearly refer to "the continuing of the existing account" as the consideration. In my opinion, the consideration is not so stated in any of the four guarantees in the instant case. All four are in the same terms. In the second lot of the guarantees, consisting of three, paragraph 1 reads:

> "In consideration of your agreeing at the request of the Undersigned not to require immediate payment of such sums of money below as are now due or unpaid and in consideration of any further sums which you may hereafter advance permit to become due to the undersigned . . . hereby guarantee payments to you on demand which may be now or may hereafter . . ."

It was pointed out by Lord Hodson in the *National Bank of Nigeria* case that it is true that the way in which consideration for a contractual obligation is expressed is not conclusive, but it is relevant in construing the terms of the contract. In my judgment, the circumstances of the instant case are entirely different to that of the two cases cited.

Earlier, I referred to the submission of Mr. Keeble wherein he stated that a guarantor may consent in advance; and it seems to me that paragraph 3 of the 1959 guarantee, and paragraph 8 of the other guarantees, where it is stated that the plaintiffs are at liberty without affecting their rights under the guarantee to determine or vary the amount of any credit to the debtor, etc., etc., gives the creditor a wide scope in dealing with the debtor without obtaining the immediate consent of the guarantors – the consent already having been given under the guarantees. In my view, Mr. Keeble is correct in saying the term "continuing security" or "continuing guarantees" is not a term of art, and I think this view can be implied from the words of Lord Hodson, in the *National Bank of Nigeria* case, when he said it is true that the way in which consideration for a contractual obligation is expressed is not conclusive. I accept the view that the term extends to a series of transactions and not merely to one. Counsel for the plaintiff also contends that there is no reason on earth, as he put it, why the creditor should not waive his credit rights under the guarantee; or the parties, i.e. the creditor and the debtor, should not agree among themselves, from a certain date, that the guarantee should not continue in force notwithstanding anything contained therein; or it might be by implication – course of conduct – that the guarantee ceased to have effect from a certain date. It is submitted that in the instant case, primarily by implication, the guarantees ceased to have effect from the determination of the defendants' agency vis à vis the bank and the guarantors. In his opening address, Mr. Keeble made it quite plain that the bank was only claiming the amount which is owed by Luvule in respect of operations carried out during the defendants' managing agency, that is to say, up to June 27, 1964. The case was fought on the footing that no attempts were made to recover from the defendants after the date of termination; and that the liability of the defendants ceased when the agency determined.

Mr. Duffus, the manager, in his evidence, a part of which I referred to earlier in this judgment, said that after the termination of the agency he had no contacts with them, except visiting the factory where he saw the defendants or their representatives supervising the hulling out and so on. The second defendant himself says in his evidence that he was well aware of the African Agency's appointment. There is also evidence concerning the drawing of the two cheques by the defendants, after the termination of their agency, which is an indication that they recognised that they were responsible for the debts up to the date of termination of their agency and not thereafter. It will be remembered that Mr. Duffus had said (and I referred to it earlier) that it was his impression that the defendants' interest in the hulling out after the cessation of their agency was to see that their financial liability was crystallised at the date of termination following consequential payments. In paragraph 4 (*h*) of the statement of defence, it is pleaded, *inter alia*, that in consideration of fourth defendant at the request of the plaintiff agreeing to refrain from in any way obstructing the new managing agents appointed by Luvule and so on, the plaintiff agreed that the defendants should not be liable under the guarantee in respect of money subsequent to the said date and that the value of the stock held by Luvule at the date of the termination shall be deducted under the guarantee.

All this shows, in my view, that by conduct the guarantees ceased to have effect from the date of the termination of the defendants' managing agency, and the defendants were fully aware that a fresh account would be opened and that it was clearly in the minds of both the bank and the defendants that the latter would only be liable for the amount imputable to their agency. If that were not so, why should the Patels or their representative supervise the hulling out and have the proceeds credited to their account? If by implication, as I find, the guarantees ceased to be in force at the termination of the managing agency, then the terms of the guarantees came in force and the bank had specific powers to open a new account.

Mr. Keeble has observed that Mr. Dalal has argued that the bank only had power to open a fresh account after the guarantees had ceased to have effect; and that he has fundamentally contradicted himself – in that he submits that because no notice was given the guarantees are still in force. Mr. Keeble says, therefore, that Mr. Dalal's argument that the bank had made a material or any alteration with the debtor cannot stand. Mr. Keeble goes on to point out that, during the managing agency of the defendants, several accounts were in fact opened, i.e. 1963, 1964, Bugaga accounts and other minor ones. If, as he says, Mr. Dalal is right in saying the guarantees are still in force, he asks the question "what objection can he have to the African Agency Account?"

We move on to the issue of conspiracy. In paragraph 3 of their statement of defence the defendants aver that the plaintiff's manager, Mr. Duffus, conspired with and/or induced Luvule to terminate the managing agency of the defendants which was consequently terminated. As a result the defendants suffered damages.

As Mr. Dalal rightly says, it is a question of fact. From the outset, I am constrained to say that there is little or no direct evidence as such on this issue; and, as Mr. Dalal in his address points out, it is difficult to bring direct evidence. The defendants, as I see it, are asking me to infer the commission of the tort. They rely, it would seem, to a large extent on the evidence of Mr. Emmanuel Lubega, a director of Luvule during 1963/1964. Mr. Dalal, in his address, dubbed his evidence as important on this aspect of the case, and remarked that he had changed sides. This witness said, *inter alia*, that the directors had split into two groups – the Kitatta Group on the one hand, and the Kyeune on the other. The former group consisted of Mr. Lubega, himself, Kittatta and Joseph Lubowa. He said that he is a son of Kitatta. In the Kyeune Group

were Mesusera Musoke, Ernest Kagwa, Yefasi Semondo and Jalat Lule. In his evidence he said that Mr. Duffus had suggested that they should get rid of the Patels.

In a case of conspiracy the burden of proving both the combination and the purpose of damaging is on the party who alleges the tort. In so far as the cases talk of a need for "just excuse" or "justification", those words seem to be no more than a description of the need for evidence as to legitimate interests which a defendant can put in to meet the plaintiff's case, when the latter has adduced evidence of apparent intention to injure on the defendant's part, and do not alter the primary burden of proof – Clerk & Lindsell on Torts (11th Edn.), p. 645. The modern leading case on this form of action appears to be *Crofter Harris Tweed Co. v. Veitch*, [1942] 1 All E.R. 142. In that case it was held that the real purpose of the embargo being to benefit the members of the trade union, the fact that it inflicted damage upon the appellants did not make it an unlawful conspiracy which was actionable at law. It is relevant to quote a passage from the opinion of Viscount Simon, L.C., in that case:

> "The question to be answered, in determining whether a combination to do an act which damages others is actionable even thought it would not be actionable if done by a single person, is not: 'Did the combiners appreciate or should they be treated as appreciating, that others would suffer from their action?' It is: 'What is the real reason why the combiners did it? Or, as Lord Cave, L.C., puts it: 'What is the real purpose of the combination?' The test is not what is the natural result to the plaintiffs of such combined action, or what is the resulting damage which the defendants realise, or should realise, will follow, but what is in truth the object in the minds of the combiners when they acted as they did. It is not consequence that matters but purpose."

Reverting to Mr. Lubega, he agrees that he signed the minutes of a meeting of the Board of Directors of Luvule held on May 17, 1964, when it was unanimously resolved to appoint African Coffee Auctioneers & Brokers Ltd. to be the managing agents of Luvule. He would have us believe that no meeting was held at which this minute was passed, and that the exhibit was brought to him for his signature. He was the man who said the resolution was passed as a result of the advice given by Mr. Duffus; and that the conversation with Mr. Duffus had taken place on June 14, 1964. When it was put to him in cross-examination that on that date (June 14, 1964) "you had already agreed to appoint African Coffee Auctioneers & Brokers Ltd. managing agents", he hesitated, and later said he had made a mistake and that it was on May 14, 1964 he had spoken to Mr. Duffus and not in June. In examination-in-chief he had said that he himself, Kitatta and one Kikambi an accountant (whom he had earlier described as also being a director but changed his evidence) had spoken to Mr. Duffus and the date he first gave was June 14, as already pointed out, but subsequently changed under cross-examination after hesitation to May 14, 1964. He would have us believe that it was at that meeting that Mr. Duffus said that the Patels were not using the money properly and suggested that new agents be appointed and that they agreed to the suggestion. Before saying that, he had said that it was Iga Kitatta who wanted the M. C. Patel group to be dismissed as managing agents. Immediately after that answer, if I may say so, I think the answer he subsequently gave involving Mr. Duffus was begged, for he was asked if he knew Mr. Duffus of National & Grindlays Bank, Masaka, and then the allegation in his evidence came. It is quite obvious that his answers are contradictory. In one breath he says it was Iga Kitatta who desired the Patels to be dismissed as managing agents, and in another he imputes it to Mr. Duffus. I recall and in fact I recorded it that Mr. Keeble

observed in the following terms: “Highly prejudicial – but admissible – not put to Duffus”. I then said: “I agree”.

It is hardly necessary for me to say that if such an allegation were to be made, it was only right and fair that it should have been put to Mr. Duffus when he was in the witness box.

This same witness in cross-examination stated he was not wrong when he said none of the other directors were consulted, because they had split into two groups. When asked how then did the others sign the minutes including himself, his answer was that he could not explain how. His next answer was he did not know if they were in fact consulted. It is futile for me to continue cataloguing this witness’s contradictions; but I am content to say that thereafter followed a series of contradictions, in one breath saying there was a meeting of directors and in another denying it. In short, I have seen and heard this man and he is clearly an unreliable and unsatisfactory witness. I do not believe him when he says that the resolution was not passed at a meeting, and I do not accept his testimony that he was present at a meeting when Mr. Duffus suggested that the Patels should be got rid of.

Mr. Dalal relies on a letter purporting to be signed by one Mayanja as “Secretary, Members Committee”. It is a letter dated February 26, 1965, addressed as from Luvule Coffee Hullers Ltd., c/o Mbazira and Ssengoba, Advocates, Kampala, and sent to the Minister of Agriculture and Co-Operatives, Entebbe. In that document it is stated, *inter alia*, that it is believed that the loss which resulted “into the appointment of Receiver and Manager” was caused by the new managing agency. It is also stated as a fact that the manager of the National and Grindlays Bank, Masaka, induced some of the directors to terminate the managing agency agreement “and induced them to appoint new managing agents suggested by the bank manager himself”. It is observed that in the penultimate paragraph there is a statement to the effect that they (meaning no doubt the members of the committee) had elected Mayanja, M. B. Kigongo and Y. Kyeyune to present the petition and to give any further explanation as he, the Minister, may need. The person who signed this letter was not called as a witness, neither was Mr. Kigongo. Mr. Kyeyune was called. Neither in examination-in-chief nor in cross-examination did he say Mr. Duffus *induced* the directors to terminate the appointment of the Patels as managing agents. In fact, he stated in cross-examination that he does not know what part Mr. Duffus played in the termination of the defendants’ managing agency. This document does not support the claim of the defendants on this issue – it carries little or no weight at all on this aspect.

In his evidence, Mr. Duffus says he was playing a very important part in this matter (matter of the Luvule Company) in discussions with the African directors. He did not advise them to change, and it did not emanate from him; but he did agree to the change. He says it was not correct to say that he wanted to Africanise the business. Mr. Dalal further argues that an adverse inference may be drawn, which would support proof of conspiracy, in that not only the three or four companies in which his clients were concerned were the managing agencies taken away, but also at least two others in Masaka which were managed by other agents. As Mr. Keeble put it, his friend is saying there was a gigantic conspiracy to get rid of all the managing agents in Masaka, and submits that does not bear looking at. For this to be achieved, Mr. Duffus would have had to combine with six or seven boards of directors to make them act on the same day and in the same way. If that were so, it means that he had an animus against not only the instant defendants, but against two other managing agents who were in no way connected with his bank. It is observed that two of the companies which changed their managing agents were not customers of the plaintiff bank; and it could hardly be said that Mr. Duffus might have wished

to take their business to his bank, for there is clear evidence that African Coffee Auctioneers & Brokers Ltd. were not in fact appointed their agents, and in fact these two companies were overdrawn with the Standard Bank. I cannot imagine any bank – the plaintiff bank for that matter – being willing to finance a company which was already overdrawn with another bank.

There is evidence before me, which I accept, that the directors of the three companies which the defendants managed would meet from time to time, and discuss the running of their businesses; and they discovered that the defendants were running them at a loss. Mr. Carter's report clearly shows that the defendants were not running the business of the companies satisfactorily. Mr. Duffus in his evidence says that at the time of the dismissal of the defendants the company was making a loss; and that he was concerned to stem this continued loss. This has not been challenged. The *Crofter* case clearly shows that it is not necessarily the consequence that matters in the conspiracy of tort, but the crucial question is what is the object – what is the purpose – what is in truth the object in the minds? Here I am satisfied that whatever Mr. Duffus and the directors might have done, they did it in the interest of the company – and, incidentally, the bank. I do not hold that Mr. Duffus instigated the dismissal of the defendants. Mr. Keeble has, correctly in my view, stated the law when he says if an agreement is to further one's own interests, even if it incidentally damages a third party, it is not actionable. I would go further, and say if Mr. Duffus did say what Mr. Lubega imputes, he would only have been acting in the interest of the bank.

In paragraph 5 of the plaint as amended the defendants aver that the plaintiff bank was negligent in not appointing the receiver and manager immediately upon termination of the defendants' managing agency. As a result of negligence and breach of duty on the part of the plaintiff bank, the defendants' liability under the guarantee was not reduced.

Mr. Dalal bases this issue mainly on the fact that the plaintiffs advanced money to the African agents without adequate security and allowed them to operate when not approved under the Coffee Act. He also contends that it was negligent to allow the African Agency to continue drawing money from the bank without seeing that it was properly applied.

I do not see where the plaintiffs owe a duty to the defendants under the guarantee so as to make them liable to negligence, neither do I see it by "proximity" under the principle in *Hedley Byrne & Co. Ltd. v. Heller*, [1963] 2 All E.R. 575. The evidence shows that the managing agents are appointed by Luvule; and it is clear the African Agents were appointed by Luvule and not by the plaintiff. The defendants were in their business for their own benefit; and the bank were doing business also for its own benefit. Even if the bank owed a duty to the defendants, was it negligent? The defendants must show that the bank was negligent. Mr. Duffus, the manager, has said that he saw no reason to believe that the African brokers were incompetent at the time of their appointment.

Earlier, in cross-examination, he said "we thought that we had a good chance of recovering the money under a new management but our optimism was not justified, unfortunately". No doubt, as Mr. Keeble says, this allegation is made because in the result further losses were made. That of course is speaking with hindsight. The two bits of evidence to which I have referred have not been contradicted. It does not follow necessarily, because further losses were made, that the bank was negligent. It has been pointed out that the extent of the losses imputed to the African agents by Mr. Dalal is exaggerated, and according to the evidence that is so. The overdraft did go up to Shs. 689,707/-, but the evidence does show that after hulling out there was a credit of Shs. 498,282/-, a difference of Shs. 191,425/-; and that is the extent of the loss

and *not* Shs. 689,707/-. The bank did not sit back and let things slide. There is evidence, and it is not disputed, that when it became apparent within six months' of the African agency's appointment, the bank appointed a receiver. Here again it is pointed out by Mr. Keeble that was hindsight. It would indeed be very extraordinary for a bank to concur in the appointment of an agent such as this negligently, when the result would be to worsen its position. It has also been submitted by Mr. Dalal that the bank did not take any proper security from the managing agents, but, as Mr. Keeble pointed out, counsel has not advanced any reason why the bank should have taken any security at all. In further proof of his submission why negligence should be imputed to the bank, it is submitted that the African agents' appointment was not approved in accordance with the Coffee Act. Mr. Vincent Millet, Senior Marketing Officer, Ministry of Agriculture, says that is so. He has not been contradicted. But it seems to me that would be a matter between Luvule and the African agents, and I cannot see how the bank could be said to have been negligent in a matter which was between two other parties. It would really be going too far by saying the bank was negligent because they allowed the African agency to continue drawing money without seeing to its proper application. If it were the duty of the bank to do that it would be unnecessarily interfering or usurping the functions of the managing agents. What is clear in this case is that, when it became apparent to the bank within six months that the African agents were making a loss, appropriate steps were taken.

As regards the claim for interest of Shs. 8,000/- on Shs. 120,000/-, I accept that it was put into a suspense account at the request of the defendants, where no interest is paid (part of Shs. 200,000/-). Later it was credited to Luvule.

During his address Mr. Dalal abandoned paragraph 6 of the defence, the counterclaim proper as he calls it.

As I see it on the evidence, the receiver was appointed primarily to recover the African Agency debt, which is being done.

As regards the return of the securities, it seems that the defendants would be entitled to have them back immediately they pay off their own debts, subject to their not forming part of any securities of any other funds.

There is no breach of contract, breach of duty or negligence on the part of the plaintiff. There will be judgment for the plaintiff for Shs. 227,981/-, with costs. Simple interest at 6 per cent.

Judgment for the plaintiff.

For the plaintiff:
OJ Keeble
Hunter & Greig, Kampala

For the defendants:
SH Dalal
Dalal & Singh, Kampala

Winklamier and others v East Africa Plans Ltd and another

[1969] 1 EA 415 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	14 March 1969
Case Number:	147/1968 (55/69)
Before:	Sheridan Ag CJ
Sourced by:	LawAfrica

[1] Company Law – Contract between company and members under which company to supply water to members – Whether members can obtain water elsewhere.

[2] Company Law – Extraordinary General Meeting – Notice required to be given to shareholders – Validity of meeting.

[3] Company Law – Membership of company – Particular class of members created by alteration of Memorandum – Whether that class is exclusive.

[4] Company Law – Resolution – Notice required to be given to shareholders – Validity of resolutions.

Editor's Summary

The second defendant was the majority shareholder in the defendant company, which by its Memorandum had power to deal in land generally. In May 1959 the Memorandum of Association of the company was altered so as to provide that the company could supply water to the members and staff of the company. In July 1959 the Articles of Association of the company were altered at an Extraordinary General Meeting, attended by the second defendant and his wife, so as to provide that (*a*) a member of the company had to hold 4,500 shares for each house to be supplied with water, and (*b*) that water could be supplied to non-members on terms to be decided by the company. Water was supplied by the company to various members and to a Mr. Matovu and when R.P. Ltd., one of the members, left the supply scheme it arranged to receive water from Mr. Matovu. At the Annual General Meeting of the defendant company in 1968 no agreement was reached as to the meter charge to be made and it was agreed that the company would cease pumping operations and would supply water at the pump house. An Extraordinary General Meeting was convened for March 26, 1968 (*a*) to amend the Articles to make a meter charge payable and (*b*) to fix the meter charge. The second defendant and his wife were the only members who attended the meeting in person, and it was resolved that a meter charge of Shs. 1,950/- should be payable and in default the water supply should be cut off. The plaintiffs as members of the company sought declarations that the resolution passed at the meeting of March 25, 1968 and which had not been circulated to members were invalid; that the meeting itself was invalid; that the second defendant could not be a member of the company; and that the supply of water to R.P. Ltd. contravened the Articles of the defendant company.

Held –

(i) the agenda did not specify the amount of the meter charge because this was open for discussion at the meeting, and although the provision for cutting off the supply of water on non-payment of the charge was not specified in the agenda, this necessarily followed from a failure to pay;

(ii) the second defendant was a member of the defendant company although he had not been registered

as owner of a house. Membership of the defendant company was not limited to those who obtained their water from it;

(iii) Nothing in the Memorandum prevented R.P. Ltd. from obtaining its water from Matovu and although it may have been ultra vires the defendant company to supply water to Matovu this was not pleaded.

Suit dismissed with costs.

Cases referred to in judgment:

(1) *Kaye v. Croydon Tramways Company*, [1898] 1 Ch. 358.

(2) *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L.R. 7 H.L. 653.

Judgment

Sheridan Ag CJ: This suit arises out of a dispute as to the supply of water to residents on Buziga Hill, Kyadondo, Kampala.

The three plaintiffs are shareholders of the first defendant company which was incorporated on June 13, 1956. They each hold 4,500 shares; so does L. L. Brown who lives in Nairobi and for whom the second defendant holds a proxy. The second defendant is a majority shareholder with 35,998 shares. Since the filing of the suit he has acquired the 9,000 shares previously held by A. Baumann & Co. (Properties) Ltd., who own two houses on the Hill, making his total holding 44,998 shares. His wife holds one share; so does Residential Properties Ltd. (hereinafter referred to as "R.P. Ltd."). This is a company incorporated in Bermuda, of which the second defendant is the manager in Uganda.

The objects of the first defendant as set out in paragraph 3 of the Memorandum of Association were generally to deal in property.

On May 16, 1959, at an Extraordinary General Meeting, a special resolution was passed whereby paragraph 3 of the Memorandum of Association was altered by the insertion of a new sub-paragraph (i) as follows:

> "To supply water to the members and staff of the Company for domestic and all other purposes in the area of Buziga Hill in Mengo District, Uganda Protectorate and to construct, purchase and operate there the necessary water for such supply."

On July 1, 1959, at another Extraordinary General Meeting attended by the second defendant and his wife, a special resolution was passed altering the Articles of Association by adding a new clause 28 as follows:

> "*Water Supply* –
>
> (*a*) Water shall be supplied to members on the following terms:
>
> (1) The member shall hold 4,500 shares of 1/- each for each house, guest house, flat or dwelling unit to which water is supplied.
>
> (2) . . .
>
> (3) . . .
>
> (4) . . .
>
> (*b*) Water may be supplied to non-members on such terms as the Company may decide from time to time at a special meeting convened for that purpose."

By Legal Notice 196 of 1960 (Now S. 1 137 – 29, Vol. XII of the Laws, p. 2347) made under s. 11 of the Waterworks Act (Cap. 137) the Kampala & District Water Board (hereinafter referred to as "The Board") was authorized to supply water to the first defendant at its pumphouse on its premises which were outside

the Kampala defined area. There was no limitation as to the persons to be supplied by the first defendant by way of resale. These included a Mr. Matovu, a non-resident, who originally operated a standpipe. By a letter dated September 9, 1960 from the Ministry of Works to the Board, the Board was

authorised to sell water to the first defendant at Shs. 3/- per 1,000 gals. for resale by the latter at a maximum of Shs. 10/- per 1,000 gals.

The second plaintiff gave evidence that in addition to paying Shs. 10/- per 1,000 gals. he paid Shs. 600/- p.a. meter charge. There was no dispute about this.

In April 1967 R.P. Ltd. left the scheme on the advice of the second defendant, due, as he says, to general bickering and bad behaviour of the other members who would not agree to a necessary increase in the price of water. A separate scheme was then established to supply the seven houses owned by R.P. Ltd. by buying from Matovu water which he bought from the first defendant, Matovu, a driver for E.A.R. & H., did not give evidence. It might have been interesting to know how he was in a position to purchase sufficient water from the first defendant to satisfy R.P. Ltd.'s needs. A considerable body of evidence was led in an attempt to show that the second defendant had so manipulated the pipes that R.P. Ltd. were getting water free from the first defendant. In particular it was alleged that a plastic pipe which passed through the top tank (which contained water for the first defendant's houses) might have been the source of the leakage. In cross-examination the first plaintiff had to concede that this was not so. When Mr. Kasozi-Kaye, the engineer/manager of the Board, inspected the installations on September 3, 1968, the second defendant was able to satisfy him that there were two separate systems. Why the second defendant saw fit to duplicate the scheme with its attendant increased costs when, according to him, the crying need was for an increased meter charge in the existing scheme, is a mystery to me.

On February 20, 1968 at the Annual General Meeting of the first defendant there was a failure to agree on the amount of the meter charge and it was agreed that the first defendant should cease pumping operations on February 25, 1968 and that thereafter members would be supplied with water at the pumphouse at the rate of Shs. 10/- per thousand gallons. Although R.P. Ltd. had left the scheme, the second defendant, representing it, does not seem to have been embarrassed at chairing the meeting.

By a notice dated March 3, 1968, signed by the second defendant as director of the first defendant, an extraordinary general meeting was convened for March 26.

The agenda was: (1) to add to clause 28 (*a*) of the Articles of Association a new sub-clause as follows:

> "(5) a meter charge shall be payable, the amount and mode of payment to be decided by the Company in General Meeting."

(2) To fix a meter charge.

At the meeting, which was attended only by the second defendant and his wife, with proxies from L. L. Brown and Baumann & Co., it was resolved that a meter charge of Shs. 1,950/- should be payable by the shareholders on April 1, 1968 for water supplied after that date and "that the Directors may cut off the supply of water if the meter charge is not paid within three days of the date of the invoice, and that the supply will not be reinstated until all the outstanding charges are paid in full, plus a reconnection charge of Shs. 40/-". The plaintiffs refused to pay this increased water charge. Their pipes were disconnected. On May 3, 1968 they obtained an injunction against the first defendant restraining it from disconnecting or otherwise interfering with the continuity of the water supply. The second defendant has produced the accounts of the first defendant for the year ending December 31, 1968, which show that if the plaintiffs had paid the meter charges, and allowing for the non-recurrent legal charges in connection with the case, it would just about have broken even.

On April 18, 1968 the present suit was filed. On June 7 an amended plaint was filed.

On July 23, by notice of motion under O. 37, r. 4 of the Civil Procedure Rules, the first defendant applied for an order that notwithstanding the injunction it be at liberty to convene a further extraordinary general meeting for the purpose of passing one of the following resolutions:

(*a*) That the resolutions passed at Extraordinary Meeting of the Company held on March 26, 1968 be and are thereby ratified with effect from that date; or

(*b*) the pumping operations should cease forthwith and that water will be supplied to shareholders, henceforth, at the bottom of Buziga Hill, shareholders to make their own arrangements to transport the same to the residences on Buziga Hill; or

(*c*) that the first defendant goes into liquidation and that costs of this application be provided for.

On August 20, Jones, J., dismissed the application referring the first defendant to its Memorandum and Articles of Association which presumably provided for the calling of such a meeting.

The amended plaint asks for declarations:

"(i) that the resolutions passed at the meeting of March 26, 1968 which were never circulated to members are invalid;

(ii) that the extraordinary general meeting held on March 26, 1968 is invalid;

(iii) that H. G. Radford cannot be a shareholder of the company;

(iv) the supply of water to the premises of Residential Properties Ltd. contravenes the provisions of the articles of association of the Company and the General Policy of the Company."

There is also a claim for damages.

Mr. Mboijana, for the plaintiffs, concedes that (i) is now academic as clause 28 has been deleted and the meter charges are now determined by the Board of Directors of the first defendant.

He relies on *Kaye v. Croydon Tramways Company*, [1898] 1 Ch. 358, where it was held that a notice convening a meeting to consider an agreement described simply as an agreement to sell an undertaking was invalid by the omission to refer to a provision for payment of a substantial sum to the directors of the selling company as compensation for loss of office and the agreement was made conditional on its adoption by shareholders of the selling company. The minutes of the meeting of March 26 show that the resolutions passed went beyond the terms of the notice, but if these other resolutions were invalid they are severable and do not affect the issue in this suit. The second defendant says that the amount of Shs. 1,950/- was not included in the notice as the matter was still open for discussion at the meeting. As regards the provision for cutting off the supply of water, I would say that it necessarily follows from a failure to pay the meter charge.

There is no evidence that the resolutions passed were not circulated to members. I do not think that the resolution was invalid; nor under (ii) that the meeting itself was invalid. Paragraph 8 of the amended plaint states that the meeting was "duly held".

On declaration (iii) the second defendant gave evidence that in 1964 he bought the house on plot 44 from R.P. Ltd., but it has not yet been registered

in his name as it is situated on official Kabakaship mailo and that it proved impossible to get the necessary consents from the now defunct Kabaka's Government. Mr. Mboijana submits that as the second defendant now obtains his water supply from R.P. Ltd. he is no longer a member of the first defendant, who obtains his water from that source under paragraph 3 of the Memorandum and who qualifies under clause 28 of the Articles of Association. Although clause 28 (*b*) might have been ultra vires paragraph 3 of the Memorandum in allowing water to be supplied to non-members (see *The Directors etc. of the Ashbury Railway Carriage & Iron Company Ltd. v. Hector Riche* (1874 – 5), 7 L.R.A.C. 653), I do not think that the members of the first defendant are confined to those who obtain water from it and who have the necessary shareholding qualification. It must be remembered that it was only amendments to the Memorandum and Articles of Association which created this class of member. In my view the second defendant qualifies as a shareholder of the first defendant.

On declaration (iv) there is nothing in the Memorandum and Articles of Association which would prevent R.P. Ltd. from obtaining from Matovu water which he gets from the first defendant. It was not pleaded that Matovu was not entitled to receive water from the first defendant as he was not a shareholder. There is no privity of contract between R.P. Ltd. and the first defendant. How Matovu's tank came to be housed in the first defendant's pumphouse and how the pipes came to be altered is another matter. While it is true that the board only supplied water to the first defendant and was probably unaware of R.P. Ltd. or Matovu, it had no objection to the resale of water by the first defendant.

Mr. Kasozi-Kaye gave evidence that the second tank, pump and handpipe (all said to be Matovu's) had never been approved by the board. Although Buziga was outside the defined area and as such the Waterworks Rules did not apply to it (rule 2), the Waterworks Act itself provides that the Act and statutory instruments made thereunder shall apply, mutatis mutandis, to a water supply outside a defined area subject to any conditions prescribed by the Minister (ss. 11, 12). No argument was addressed to me as to how, if at all, the plan infringed the provisions of the Act or the Rules, and, if it did, what would be the effect on the claim.

In my view the plaintiffs were not entitled to the declarations for which they pray.

On the question of damages there is only the evidence of the second defendant that he was completely without water for one day. In these circumstances the damages would have been nominal.

Suit dismissed with costs.

For the plaintiffs:
C Mboijana
Mboijana & Co, Kampala

For the defendants:
OJ Keeble
Hunter & Greig, Kampala

Ismail v Republic

[1969] 1 EA 420 (HCT)

Division:	High Court of Tanzania at Mwanza
Date of judgment:	13 December 1969
Case Number:	473/1968 (56/69)
Before:	Mustafa J
Sourced by:	LawAfrica

[1] Appeal – Additional evidence – Application to admit on criminal appeal – Indeterminate evidence directed to showing complainant lied in court below – Not admissible – Criminal Procedure Code, s. 322 (1) (*T.*).

[2] Evidence – Appeal – Admission of additional evidence – Indeterminate evidence directed to showing complainant lied in court below – Not admissible.

Editor's Summary

This was an application for the admission of additional evidence in a criminal appeal. The evidence, which was somewhat indeterminate, was directed to showing that the complainant had lied in the court below when he denied having been imprisoned.

Held – the applicant had failed to make out a case for additional evidence to be called (*Elgood v. Regina* (1) distinguished).

Application refused.

Cases referred to in judgment:

(1) *Elgood v. Regina*, [1968] E.A. 274.

Judgment

Mustafa J: This is an application for additional evidence to be called in respect of an appeal filed by the applicant under s. 322 (1) of the Criminal Procedure Code.

Applicant was convicted of assault causing actual bodily harm, contrary to s. 241 of the Penal Code, in the Resident Magistrate's Court, Mwanza; and was sentenced to five months imprisonment. He has already served his sentence.

Applicant filed his memorandum of appeal on June 20, 1968, and on June 24, 1968 his advocate made an application for bail pending appeal. The application for bail was refused.

During the bail application counsel for the applicant suggested that he would probably file a supplementary petition of appeal based on additional evidence. On November 1, 1968 the matter came up before the court again and counsel for the applicant said that he was still making inquiries as regards the additional evidence he proposed to adduce. He is now making his application for additional evidence to be called.

It seems that in the trial court the complainant, one Baldev Singh, had denied when cross-examined

that he had been imprisoned for three years. Complainant also denied he was imprisoned in Tabora. Learned counsel for the applicant now states that he wishes to adduce evidence to show that in a Criminal Appeal No. 94 of 1967 (East Africa) there is a person by the name of Baldev Singh Kalsi who was one of the appellants in that appeal, and the record would show this Baldev Singh Kalsi was imprisoned for a criminal offence for two years. He says he is going to ask a court clerk to produce this record. At the hearing of this application there is no such record. Learned counsel states that if his application is allowed he would be in a position in due course to produce a certified copy of the record. It appears the purpose of this additional evidence

is to show that complainant had told a lie in court when he denied he had served a sentence of imprisonment in Tabora. Learned counsel for the applicant referred to the case of *Elgood v. Regina*, [1968] E.A. 274 as regards the provisions upon which an appellate court in a criminal case will exercise its discretion in deciding whether or not to allow additional evidence to be called for the purposes of an appeal.

Learned counsel says the applicant was unrepresented at the trial court and learned counsel himself has had considerable difficulty in trying to obtain this record, which he said he began doing some time in June this year. He says in the circumstances it could be said that this evidence was not available at the trial.

Learned counsel says the complainant in the subject case, Baldev Singh, has already died a couple of months back. As it stands, there is nothing before me which would indicate that the man called Baldev Singh Kalsi referred to in the record in Criminal Appeal No. 94 of 1967 (which record counsel wants to produce) would be the same man as complainant Baldev Singh in the subject case. The name of the court clerk who is to produce the record has not been given nor has it been seriously suggested that he would be in a position to connect the name Baldev Singh Kalsi appearing in Criminal Appeal No. 94 of 1957 with the complainant Baldev Singh in the subject case.

The trial magistrate in his judgment dealt with the evidence of the prosecution and the defence, and, apart from the evidence of the complainant himself, there is other independent evidence which if believed would establish that appellant assaulted complainant as alleged. The trial magistrate has said he believed this independent evidence. At one stage learned counsel for the applicant said the only direct evidence against the appellant was that of complainant but later he realised that it was not so.

Learned counsel has argued that if the trial magistrate had known that complainant had told a lie about his previous conviction that could have materially affected his mind in his assessment of the evidence. I do not think this piece of additional evidence, assuming it is true and assuming that it relates to the complainant in the subject case, in view of what the trial magistrate has said in his judgment, would necessarily have materially affected his mind in his assessment of the evidence. The facts in *Elgood v. Regina, supra,* are clearly distinguishable from those in the present case. There is also the fact that even at this stage the applicant's proposed additional evidence is somewhat indeterminate and inchoate.

I do not think applicant has made out a case for additional evidence to be called and I refuse leave.

Leave refused.

For the applicant:
NP Dhanani
NP Dhanani, Mwanza

For the respondent:
G Liundi (State Attorney, Tanzania)
Attorney-General, Tanzania

Mtoakodi v Republic

[1969] 1 EA 422 (HCT)

Division:	High Court of Tanzania at Mwanza
Date of judgment:	28 November 1968
Case Number:	684/1968 (57/69)
Before:	Seaton J
Sourced by:	LawAfrica

[1] Appeal – Jurisdiction – District Court magistrate exercising revisional powers – Accused subsequently appealing – District Court magistrate assuming himself functus officio – Whether magistrate could consider on appeal matters not dealt with in revision – Magistrates' Courts Act 1963, *s.* 17 (*T.*).

[2] Evidence – Wife as a witness – Magistrate ruling that accused must bring all wives as witnesses or none – Whether this an injustice.

Editor's Summary

The appellant was convicted in the Primary Court of theft of cattle and sentenced to three years' imprisonment and twenty-four strokes plus a fine of Shs. 500/- or six months' imprisonment and Shs. 300/- compensation to the complainant. On revision, the District Court magistrate reduced the sentence to three years' imprisonment and twenty-four strokes plus the Shs. 300/- compensation. The appellant then filed a petition of appeal and this was rejected by the District Court magistrate on the assumption that he was functus officio. The appellant appealed against the decisions of both Primary Court and District Court magistrates.

Held –

(i) while the District Court could not, at the hearing of an appeal, review an order made by a District Court magistrate on revision, it could consider portions of the memorandum of appeal which had not been the subject of its previous considerations;

(ii) the appellant suffered an injustice in being deprived of the right to call his wife as the assessors in the Primary Court had based their opinion as to the appellant's guilt, at least in part, on his neglecting to call his wives as witnesses.

Appeal allowed. Case remitted to District Court.

Cases referred to in judgment:

(1) *Suleman Ahmed and Others v. R.* (1922), 9 E.A.L.R. 19.

(2) *Gordhan Gopal v. Chhagan Raja* (1935), 17 K.L.R. 65.

Judgment

Seaton J: The appellant was convicted on May 18, 1968 of cattle theft and sentenced to three years'

imprisonment and twenty-four strokes of corporal punishment plus a fine of Shs. 500/- or six months, the sentences of imprisonment to run concurrently if the fine were not paid, and Shs. 300/- compensation to the complainant or distress in default. The District Court, apparently without notice to the appellant and on its own initiative, on May 23, 1968 exercised its revisional powers on the following grounds:

> "(1) There are no special circumstances in this case which compelled the magistrate to fine accused in addition to a prison sentence; and
>
> (2) A sentence of imprisonment in default of payment of fine cannot be ordered to run concurrently in addition to any other sentence vide s. 2 (3), Third Schedule to the Magistrates' Courts Act 1963."

The District Court accordingly ordered that the sentence of Shs. 500/- be set

aside, leaving the sentence of imprisonment and corporal punishment plus the order for compensation as authorised by s.6 of the Minimum Sentences Act 1963.

This revisional order of the District Court was, if I may say so with respect, properly made under s. 17 of the Magistrates' Courts Act 1963. On May 30, 1968 the appellant submitted a petition of appeal to the District Court, setting out his objections to the conviction by the Primary Court. This appeal came before the District Court on July 13, 1968 when the following order was made:

> "Matter dealt with in Criminal Revision 28/68. Appeal file marked closed."

The appellant has now appealed to this Court against the Primary Court conviction and the District Court order. Before going into the merits of his case, it is desirable to consider whether the District Order of July 13, 1968 was correct. It would appear to be based on the assumption that the District Court, having exercised its revisional powers, was functus officio and could not again deal with the same case on its coming before it by way of appeal.

I would have thought there might be some merit in this view had the District Court exercised its revisional powers in respect of the conviction, for example, by quashing it, and substituting another; or if the present appeal were merely against the sentence of the Primary Court. The exact point at issue does not seem to have previously arisen in any Tanganyika case, but two Kenya cases have dealt with somewhat similar questions.

In *Suleman Ahmed and Others v. Rex* (1922), 9 E.A.L.R. 19, in an appeal lodged against a conviction where the Supreme Court had made an order in revision altering the conviction entered by a magistrate, it was held that such an order cannot be reviewed. The Supreme Court considered, however, that it was able, at the hearing of the appeal, to consider the portions of the memoranda asking that the sentences be reduced. In *Gordhan Gopal v. Chhagan Raja* (1935), 17 K.L.R. 65, where an order made by a subordinate court had been reversed on revision by a single judge, and the party aggrieved then applied to the Supreme Court to review the order made on revision, it was held that the Court had no power to review an order made by one of its judges on revision in a criminal case.

If my interpretation of the two above cited Kenya cases is correct, there would appear to be persuasive authority for the view that while the District Court could not, at the hearing of an appeal, review an order made by a magistrate of that court in revision, it could consider the portions of the memorandum of appeal asking that the conviction be quashed, as this was a matter which had not been the subject of its previous consideration.

Although I am thus of the view that the District Court's order of July 13, 1968 was wrong and the appeal against conviction should have been heard, I would not interfere with such an order were I satisfied that it had occasioned no injustice. But it appears from a perusal of the record that the appellant was not permitted to call as a defence witness his wife Martiana. The reason for this seems to have been that the Primary Court was of the view that either all of the appellant's wives should be called as defence witnesses or none of them. The Primary Court magistrate commented in his judgment on request by the appellant as follows:

> "The accused Philipo has applied for the evidence of his wife Martiana whom he alleges to have gone with at Nyangalamila. This court could not accept her evidence as she is his wife and she is the one who was arrested on that day. His wives could not be brought in court as the accused himself did not prefer their evidence."

The Primary Court magistrate noted that the opinion of the first assessor as to the appellant's guilt was based at least in part on his neglecting to call for the evidence of his wives. The appellant has not raised this question in his memorandum of appeal which mostly challenges the conclusions of fact on which the conviction was based. Yet it seems there is a question of some substance as to whether the appellant suffered an injustice by being deprived of the right to call his wife, Martiana, as a defence witness. For these reasons, I am of the view that the appeal should be allowed in part. The case file is remitted to the District Court with a direction to hear and determine the appeal against conviction in the manner prescribed in ss. 16 and 17 of the Magistrates' Courts Act.

Order accordingly.

No appearance by either party.

Re Mauchauffee
[1969] 1 EA 424 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	18 December 1968
Case Number:	268/1968 (58/69)
Before:	Harris J
Sourced by:	LawAfrica

[1] Probate and Administration – Administration – Intestate – Procedure – When citation to person equally entitled to administration with applicant will be dispensed with – Indian Succession Act 1865, *ss.* 200, 204 (*K.*).

Editor's Summary

A grant of letters of administration intestate was applied for by one of the daughters of the deceased. The other daughter was resident in France and did not reply to letters. Because the estate was insolvent the petitioner applied to dispense with the issue and service upon her sister of a citation to accept or refuse probate.

Held – In the special circumstances of the insolvency of the estate citation would be dispensed with; but the grant issued to the petitioner would be limited until the sister applied for and obtained a grant.

Application allowed.

No cases referred to in judgment

Judgment

Harris J: This is a petition for a grant of letters of administration to the estate of the deceased who died intestate on January 21, 1968, at Nairobi, domiciled in Kenya, and leaving as his nearest of kin two daughters only, of whom one is the applicant. The matter was listed for argument by reason of the fact that the applicant contends that, in the special circumstances of the case and contrary to the ordinary practice of the probate registry, the grant should be issued to her alone without either a formal consent being obtained from, or a citation issued to, the other daughter.

The facts may be shortly stated. The deceased at the time of his death was actually or very nearly insolvent, and counsel for the petitioner has satisfied me that today, taking into account the expenses of administration and other matters, his estate is in fact insolvent and the claims of his creditors will not be met in full. From this it follows that nothing will remain for distribution to either of

his daughters. The second daughter is Madame Corinne Mauchauffee Lefait, who is stated to be of full age and resident in France, but although several letters have been addressed to her in the matter at her last known address by the advocates for the petitioner none of them has brought forth a reply. In addition, on February 2, 1968, the usual statutory notice pursuant to s. 29 of the Trustee Act (Cap. 167) was published at the instance of the petitioner (mistakenly described therein as "the administrator") in the "Kenya *Gazette*" inviting "any person having a claim against, or an interest in, the estate of" the deceased to send particulars to her advocates within the time specified (which has now expired) and, although such a notice is intended primarily to protect the personal representative from claims by creditors who come on the scene after distribution of the assets, the fact that no communication was received from the second daughter in response to the notice is not wholly irrelevant to the issue before me.

By s. 200 of the Indian Succession Act 1865 it is provided that "when the deceased has died intestate, those who are connected with him, either by marriage or by consanguinity, are entitled to obtain letters of administration of his estate and effects in the order and according to the rules hereinafter stated", and s. 204 declares that "those who stand in equal degree of kindred to the deceased are equally entitled to administration". These provisions do not expressly confer upon the court a discretion in the choice of administrator similar to that at one time conferred upon the ordinary by the statutes of administration in England but nevertheless it had long been the practice in this country for the court, in a case such as the present, where the precise whereabouts of one of several persons entitled to a grant are not known so that his consent cannot be obtained, to require the issue of a citation before making a grant to the other or others of them.

Objection to this course has been taken in the present case owing to the estate being insolvent, and the question arises as to whether the issue of such a citation can properly be dispensed with. Although when there are numerous persons equally entitled to a grant and aware of their rights the court commonly exercises a discretion as to whether all or, if not, which of such persons should be given the grant, it is not entirely clear that a selection can properly be so made as to exclude one who may be without notice, actual or imputed, of his rights, and it is to meet this difficulty that normally a citation is issued.

If it were not for the factor of insolvency I would find it difficult to dispense with a citation in the present case, but in the special circumstances I direct that a grant may be issued to the petitioner without citing the sister in France but limited until that sister shall herself apply for and obtain a grant.

Order accordingly.

For the applicant:
SR Wollen

For the petitioner:
Macdougall & Wollen, Nairobi

Kigorogolo v Rueshereka
[1969] 1 EA 426 (HCU)

Division: High Court of Uganda at Kampala

Date of judgment: 10 February 1969

Case Number: 795/1968 (59/69)

Before: Phadke Ag J

Sourced by: LawAfrica

[1] Criminal Law – Criminal trespass – Whether Penal Code (*Cap.* 106), *s.* 286 (*U.*) *may be invoked to enforce an order of a civil court.*

[2] Criminal Law – Criminal trespass – Objects of section are not to obtain possession of land for complainant – Penal Code (*Cap.* 106), *s.* 286 (*U.*).

[3] Criminal Law – Disobedience of lawful orders – Order made in a civil suit – Whether Penal Code (*Cap.* 106), *s.* 111 (*U.*) *can be invoked.*

[4] Criminal Law – Trespass – Accused put into possession of land with the consent of owner – No intention to "intimidate, insult or annoy" – Penal Code (*Cap.* 106), *s.* 286 (*U.*).

Editor's Summary

The appellant had given permission to the respondent to cultivate a portion of his land, but when the respondent built a hut on the land, the appellant sued in the magistrate's court for vacant possession. An order was made against the respondent on December 31, 1963, but the respondent failed to comply with the order and for this default was prosecuted and fined. The respondent continued in possession of the land and was again prosecuted and sentenced to three months' imprisonment. The respondent, after serving his sentence, still refused to vacate the land and was charged in the magistrate's court with criminal trespass contrary to Penal Code, s. 286, and with disobedience of lawful orders contrary to Penal Code, s. 111. The magistrate dismissed the complaint, against which dismissal the appellant appealed.

Held –

(i) when, in a civil suit, an order has been made against a person and that person defaults in complying with the order, such default cannot be made the subject of proceedings under Penal Code, s. 111;

(ii) similarly, in regard to Penal Code, s. 286, when a remedy is elsewhere provided and available to a person to enforce an order of a civil court, he should not be permitted to invoke the assistance of the criminal law for the purpose of such enforcement;

(iii) Penal Code, s. 286, refers to entering upon property in the possession of another, with the intent to commit an offence or to intimidate, insult or annoy any person; the respondent was already in possession with the consent of the appellant and did not manifest the intent to commit any of the offences within the section.

Appeal dismissed.

Cases referred to in judgment:

(1) *Uganda v. Mutumba* (Uganda High Court Criminal Revision No. 101 of 1968) (unreported).

(2) *Uganda v. Ephrahim and another* (Uganda High Court Criminal Revision No. 148 of 1968) (unreported).

(3) *Uganda v. Ganafa* (Uganda High Court Criminal Revision No. 102 of 1968) (unreported).

Judgment

Phadke Ag J: The appellant made a written complaint, dated July 31, 1968, in the magistrate's court at kabale, applying for the issue of a warrant or summons against the respondent for committing two offences, namely (1) criminal trespass contrary to Penal Code, s. 286, and (2) disobedience of lawful orders contrary to Penal Code, s. 111. The complaint was a lengthy one and stated numerous factual matters in support thereof.

The substance of the complaint may be stated as under:

In August 1956 the appellant gave permission to the respondent to cultivate on a portion of the appellant's "kibanja". In 1962 the respondent erected a mud and grass house on the land, whereupon the appellant sued the respondent for vacant possession of the portion occupied by the latter. This suit was Civil Case No. 92 of 1963 in the Sub-County Court of Bugangali. The suit was heard and determined by a magistrate grade III who, on December 31, 1963, ordered the respondent to vacate the portion of land in his occupation. The respondent did not comply with the order of the court. For this default he was prosecuted (probably for criminal trespass), convicted and fined Shs. 60/- in Criminal Case No. 106/1964 in the same court. The respondent paid the fine, and thereafter sought permission from the appellant to remain on the land. The appellant refused to give him such permission. As the respondent continued to ignore warnings given to him by persons in authority and persisted in remaining in occupation of the land, he was again prosecuted in Criminal Case No. 49/1966 in Ruzumbura Country Court for failing to comply with the order of the court in the civil case, was convicted on his own plea of guilty and sentenced to three months' imprisonment. The respondent is still in occupation of the portion of land in question.

The appellant's aforementioned complaint, and the affidavit in support thereof, were considered by the magistrate grade I, who dismissed the complaint. This appeal is brought against that order of dismissal. The Magistrates' Courts Act, s. 30, provides for an appeal as of right to the High Court.

The learned magistrate held that the complaint was misconceived, relying upon the judgment of Mead, J. in Uganda High Court Criminal Revision No. 101 of 1968, *Uganda v. Mutumba*. In that case the particulars of the offence showed that the order which the accused disobeyed was the judgment of a civil court. The learned judge, in quashing the conviction and setting aside the sentence, observed as follows:

> "It cannot be emphasised too strongly, particularly of Grade III, that the provisions of section 111 of the Act do not apply to a judgment of a civil court for non-compliance with the terms of which procedure is laid down in the Civil Procedure Rules."

In Uganda High Court Criminal Revision No. 148 of 1968, *Uganda v. Ephrahim and Another* (High Court Monthly Bulletin, August, 1968) the same learned judge held that the trial was a nullity and quashed the conviction on the ground that the order which the accused persons were charged with having disobeyed was not an order within the contemplation of Penal Code, s. 111, because the order was one made in a civil suit.

In Uganda High Court Criminal Revision No. 102 of 1968, *Uganda v. Ganafa* (High Court Monthly Bulletin, June, 1968) the accused had been convicted of two offences – (1) disobeying lawful orders contrary to Penal Code, s. 111, and (2) refusing to attend court when served with summons contrary to Criminal Procedure Code, s. 95 (3). The accused had been ordered in a civil suit to pay a sum of money.

He failed to pay and a notice to appear and show cause was served upon him. He failed to appear. Russell, J., quashed the convictions, and observed that it was certainly not a criminal offence to fail to pay a civil

debt or to fail to appear and show cause, and the criminal law should not have been invoked to enforce payment.

The three decisions cited above clearly express the view that when in a civil suit an order has been made against a person and that person defaults in complying with the order, such default cannot be made the subject of criminal proceedings against him under Penal Code, s. 111. I respectfully agree with this view, and in my opinion the learned magistrate was right in refusing to issue a warrant or summons against the respondent for an offence contrary to s. 111.

On behalf of the appellant, counsel submitted that the magistrate could nevertheless have ordered the issue of a warrant or summons for the offence of criminal trespass contrary to Penal Code, s. 286, and that the magistrate had given no consideration to this aspect of the complaint. He submitted that the facts given in the complaint were such as to attract the provisions of s. 286 (*b*).

In my opinion, the view expressed in the above mentioned three decisions, with which I agree, in relation to the application of s. 111 is equally applicable to Penal Code, s. 286. When a remedy is elsewhere provided and available to a person to enforce an order of a civil court in his favour, I see no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of such enforcement. In a civil case a person who is under an obligation to comply with an order of the court is always in a position to apply for indulgence and the court has the discretion for sufficient reason to grant him appropriate indulgence.

In a criminal case, however, the person in put in jeopardy and his personal liberty is involved. In this particular case, there is a remedy available to the appellant by means of an application either under the Magistrates' Court (Grade II and III) Civil Procedure Rules, r. 30, or under Ord. 19, r. 84 of the Civil Procedure Rules.

I would also mention one other matter. If the appellant's object is to obtain possession of the land according to the order of the civil court, how could that object be achieved by taking criminal proceedings under s. 286? Assuming that the respondent were to be prosecuted, convicted and fined or imprisoned, how could such result help the appellant in getting possession of the land? As stated by him in the complaint, on two previous occasions the respondent was prosecuted, but the appellant is still without possession of the land. If the object of the appellant is to overawe the respondent by brandishing at him the sword of the criminal law and the possibility of punishment thereunder such an object is unworthy to say the least and cannot be countenanced by this Court.

Further, in my opinion, the facts given in the complaint were not such as could have satisfied the learned magistrate *prima facie* (see Criminal Procedure Code, s. 85 (4)) of the commission of the offence of criminal trespass. I will refer to three statements included in the complaint:

(1) "I was put in possession by Court according to practice and procedure then obtaining before Native Courts."

(2) "On 6/7/64 the Defendant was prosecuted in Criminal Case No. 106/64 (probably for criminal trespass) in Sub-County Court Bugangali when said Defendant failed to comply with Court Order."

(3) "On 21/9/64 Mr. Ruteshereka came to me and requested me in writing to allow him to stay in my part of my Kibanja and agreed that if I do not allow him he would have to vacate."

Section 286 of the Penal Code is as under:

"Any person who –

(*a*) enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person; or

(*b*) having lawfully entered into or upon such property remains there with the intent thereby to intimidate, insult or annoy any person or with intent to commit any offence,

is guilty of the misdemeanour termed criminal trespass and is liable to imprisonment for one year."

In my opinion, the words "*in the possession of another*" refer to actual possession and not mere juridical possession. There is also the question of the intent of the offender. This is to be gathered from the circumstances of the case. There is a distinction between the phrase "with intent" and "with knowledge" and the word "intent" cannot be read as if it were identical with "wish" or "desire". The intent referred to in the section is "to commit an offence" or "to intimidate" (meaning to overawe, to put in fear by a show of force or threats or violence) or "to insult" (meaning to assail with scornful abuse or offensive disrespect) or to annoy (meaning to molest). The conduct attributed to the respondent according to the facts given in the complaint did not *prima facie* show that he was engaging in any one or more of these forbidden activities. The gist of the complaint was no more than that the respondent by his obstinacy in not complying with the order of a civil court was keeping the appellant out of the possession of certain land.

For the reasons given above, the appeal is dismissed.

Appeal dismissed.

For the appellant:
SV Pandit
SV Pandit, Kampala

For the respondent:
AG Deobhakta (Senior State Attorney, Uganda)
Director of Public Prosecutions, Uganda (for the State)

Re Eryeza Bwambale & Co Ltd

[1969] 1 EA 430 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	7 March 1969
Case Number:	14/1968 (62/69)
Before:	Goudie J
Sourced by:	LawAfrica

[1] Company – Appointment of inspectors – Application for appointment of inspectors under Companies Act, s. 165 (*U.*) *– Grounds upon which inspectors appointed.*

[2] Company – Appointment of inspectors – Application for appointment of inspectors under Companies Act, s. 164 (*U.*) *– Number of members required to make the application – Competence of application.*

[3] Company – Minority – Oppression – Whether fact that minority always outvoted is evidence of oppression – Application for appointment of inspectors.

Editor's Summary

The minority shareholders in the respondent company asked the court to exercise its powers under the Companies Act, s. 165 and appoint one or more inspectors to investigate the company's affairs. The applicants claimed, *inter alia*, that the second respondent, who held the majority of the shares in the company, was dictatorial and had not given them sufficient information about the company's affairs; and that the company had failed to declare a dividend.

Held –

(i) although the deponent of the affidavit held at best 1/28th and at worst 1/169th of the issued shares he had affirmed that he was acting on behalf of the other named applicants and thus the application was competent;

(ii) application for appointment of inspectors under s. 165 was not the appropriate remedy where the applicants complained that they were being oppressed or that the company had unreasonably refused to declare a dividend;

(iii) provided the information required to be given in or with the accounts, or otherwise by law, was given the withholding of information would not usually be sufficient grounds to appoint investigators;

(iv) the appointment of ad hoc inspectors, private professional accountants, would be establishing a precedent which would only be justified in absolutely exceptional circumstances, which did not exist in this case.

Obiter –

(i) if the motivating power behind an application under s. 165 holds a very small proportion of the company's issued shares, *prima facie* the application does not carry a great deal of weight;

(ii) the mere fact that minority shareholders find themselves automatically outvoted is not in itself evidence of oppression.

Application dismissed, but without any order as to the costs of the second respondent.

No cases referred to in judgment

Judgment

Goudie J: This is an application, made by way of Notice of Motion, in the name of fifteen minority shareholders in the above mentioned company against the company itself and the major shareholder requesting the Court to appoint one or more competent inspectors to investigate the affairs of the company and to report thereon as provided by s. 165 of the Companies Act.

The first point to be noted is that although the application is in the name

of no less than fifteen minority shareholders the application is founded entirely on the affidavits of one shareholder only, Benezeri Kabyanga. This shareholder claims to own five shares of Shs. 1,000/- each but the company claims, or rather the second respondent on the company's behalf claims, that he is the holder of only one share and that he has been refused an allotment of the other four shares as he has failed to pay for them.

The Memorandum of Association shows the company to have an authorised share capital of Shs. 170,000/-, divided into 170 ordinary shares of Shs. 1,000/- each, and the second respondent to have agreed to take 125 shares and the said Benezeri Kabyanga and two others five shares each. It will thus be seen that the deponent to the affidavits, on which the whole application is based, at best has, even according to the Memorandum, 5/140 = 1/28th minority share. The Return of Allotment of Shares shows this deponent to have paid for only one share of 169 issued. If this is correct, and nowhere does it seem to appear that he has ever paid for the four additional shares which he claims, his interest is 1/169th. This hardly seems to me to suggest that, if this is the motivating power behind the application, it *prima facie* carries a great deal of weight. However, the deponent has affirmed to the fact that he has made his affidavit on behalf of the other named applicants and, as together they represent more than one-tenth of the shares issued, the application, for what it is worth, is competent.

It is not altogether clear from the affidavits just what is the substance of the applicants' case. It seems to me there is a great deal of irrelevant matter in the affidavits, particularly in relation to the powers of the second respondent. He is continually referred to as the "whole and sole", meaning he is in effect the company since he holds the "lion's share" and "calls the tune". Whether, however, he has paid actual cash for shares or paid for most of the cost of the buses to enable the company to function at all and has taken shares in lieu I think there can be little doubt that his financial commitments far outweigh those of the minority shareholders either individually or en bloc. Thus, there is as such nothing illegal about his being able to outvote and even "steamroller" the minority shareholders provided he does not do so fraudulently or misappropriate.

1*st affidavit, para*. 4

I, therefore, see no merit in the first ground that his powers are "dictatorial".

Paragraph 5

The failure to make a Return of Allotment of Shares has been explained and remedied.

Paragraph 6

Seems to me to have little substance inasmuch as the Return seems to reflect the true position apart from the omission of the names of "shareholders" who have not paid for their shares and an obvious typographical error in regard to one share certificate.

Paragraph 7

There is no proof that the second respondent has prevented the calling of any extraordinary general meeting. In fact one was called and attended by sixteen members. The fact that they could not by their vote do anything effective is another matter. If they wish to contend that the affairs of the company are being conducted in such a way as to be oppressive to minority shareholders other possible remedies are available to the minority, but the mere fact that they find themselves automatically outvoted certainly is not in itself evidence of oppression.

Paragraph 8

There is no allegation that the accounts have not been duly audited and passed.

Paragraph 9

I do not consider it unreasonable, if proper accounts are kept, that the omnibuses should be in the name of the second respondent personally whilst on hire purchase. It does not now seem in dispute that they have been put into the name of the company and the three new buses, allegedly bought out of profits, are in the name of the company. With regard to one bus having "vanished", this hardly seems likely if the accounts have been audited and it has been explained in a replying affidavit.

2*nd affidavit*

This seems to include little fresh matter. The deponent's suggestion that his signature to the Memorandum was obtained by fraud and he did not realise what it was all about until it had all been translated into Swahili at a later date seems to me almost ludicrous. I confess I find it difficult to comprehend how a Swahili Memorandum of Association could read without the use of a great number of English words. to my knowledge limited companies were unknown to the indigenous Swahili.

Paragraph 13

It is not in dispute that no dividend has been paid and there are remedies available if this is unreasonable. This is not, however, the appointment of inspectors to investigate the company's affairs.

I note that there are three affidavits in reply and a suggestion is contained of a third supporting affidavit "which is undated". I do not seem to have a copy of this third supporting affidavit but from the arguments it is doubtful whether it could have contained any fresh matter.

I do not consider there is anything of substance to investigate and report upon about the affairs of this company. Clearly the minority shareholders, or at least some of them, are dissatisfied with their lack of any say in how the so-called "whole and sole" is running the company. I also think they want to engage in a "fishing expedition" to try to dig up a few irregularities. However, the power to appoint inspectors is clearly "borrowed" from ss. 164 and 165 of the English Companies Act, which envisage the appointment of official inspectors whose job it is to investigate the affair of companies for the Board of Trade or, at the request of the courts, through the Board of Trade. We have no such similar official machinery in Uganda and the appointment of ad hoc inspectors, private professional accountants, would be establishing a precedent which I think would only be justified in absolutely exceptional circumstances which I do not consider exist in this case. Even with official Board of Trade inspectors the power is "not readily exercised" and *prima facie* shareholders in a company are expected to manage their own affairs in accordance with the company's constitution and the power cannot be used "for giving the members something for which their contract with the company under the Articles does not provide". Again, provided the information required to be given in or with the accounts, or otherwise by law, is given the withholding of information is not usually sufficient (Palmer's Company Law, 20th Edn., p. 653 et seq.).

The application is dismissed. I think it was misconceived in its present form. However, I agree with the second respondent that it is very doubtful if there was any power to add him as a party without his consent so I do not propose to make any order in his favour as regards costs since he made no application to be struck out as a party.

Order accordingly.

For the applicants:
Z Haque

Haque & Gopal, Kampala

For the respondents:
VN Ponda
Ponda, Asaria & Co, Kampala

Muyimba and others v Uganda
[1969] 1 EA 433 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	23 March 1969
Case Number:	654 – 656/1968 (63/69)
Before:	Russell J
Sourced by:	LawAfrica

[1] Constitutional law – Criminal trial – Legal representation of accused – Whether right of accused to legal representation infringed – Constitution of Uganda, art. 15 (2) (*d*) *and* (*e*).

[2] Constitutional law – Criminal trial – Legal representation of accused denied – Effect of.

[3] Criminal law – Appeal – Retrial – When retrial may be ordered – Accused denied constitutional right to legal representation at trial.

Editor's Summary

One of three appellants charged jointly with an offence was represented by an advocate. He had been in custody since May 1968 and the police were aware that an advocate had been instructed in June 1968. On September 5, 1968, the hearing of the case was fixed for September 10, 1968, at Masaka which is 80 miles from Kampala where the advocate practised. The advocate was informed that the case was fixed for hearing by telephone only on the morning of the hearing. He was engaged in the High Court in Kampala. The magistrate was not told that the advocate had been informed only that morning that the case was fixed for hearing. The magistrate accordingly allowed the trial to proceed. The appellant appealed on the ground that he had been denied the right to legal representation given to him by the Constitution of Uganda.

Held –

(i) the appellant had been deprived of right to be legally represented;

(ii) this was a fundamental defect which had the effect of nullifying the trial (*Galos Hired and another v. R.* (1) followed);

(iii) a retrial would be ordered as the trial of the appellant had been defective (*Fatehali Manji v. Republic* (6) followed).

Conviction quashed. Retrial ordered.

Cases referred to in judgment:

(1) *Galos Hired and another v. R.*, [1944] A.C. 149.

(2) *Kingston v. R.* (1948), 32 Cr. App. R. 183.

(3) *Yusuf Gitta v. R.*, [1959] E.A. 211.

(4) *Fatehali Manji v. Republic*, [1966] E.A. 343.

(5) *Salim Muhsin v. Salim Bin Mohamed and Others* (1950), 17 E.A.C.A. 128.

(6) *Ahmedali Ali Dharamsi Sumar v. Republic*, [1964] E.A. 481.

Judgment

Russell J: The three appellants were jointly charged with the offence of robbery with aggravation contrary to ss. 272 and 273 (*b*) of the Penal Code. From the evidence on record it is clear that the charge should have been for an offence punishable under s. 273 (1) (*b*); and this is also clear from the particulars of offence which read:

> "Jamiro Muyimba, Pasikali Samula and Paulo Samula on the 9th of November 1967 at Kawunguli village in the Masaka District, being armed with a big stone, ropes and torches together robbed Paulo Lutandaza of six women clothes, one gomesi one trousers and Shs. 215/- cash, and or

> immediately before or immediately after the time of the said robbery used personal violence to the said Paulo Lutandaza and Namugendo."

They were tried before an Acting Chief Magistrate and were all convicted and sentenced to six years' imprisonment and six strokes. They have all appealed against both conviction and sentence.

The first appellant is represented by counsel and his memorandum of appeal differs from the memorandum of the second and third appellants in that it raises an issue of law as well as issues of fact, and I shall therefore deal firstly with the appeals of the second and third appellants which raise substantially the same issues of fact. [His Lordship then dealt with the appeals of the second and third appellants and continued:] For these reasons I dismiss the appeals of the second and third appellants against conviction. Under the circumstances their sentences are not excessive and their appeals against sentence are also dismissed.

In the first appellant's memorandum of appeal the first and third grounds of appeal differ from the grounds of appeal of the second and third appellants, with which I have already dealt. They read:

> "1. Because the learned Acting Chief Magistrate's refusal to grant an adjournment so as to enable the appellant's counsel to be present amounted to a violation of the appellant's legal right of being defended by an advocate of his choice."
>
> "3. Because the learned Acting Chief Magistrate erred in rejecting the defence of the appellant without giving reasons for doing so."

As to the first ground of appeal it is common ground that by art. 15 (2) (*d*) of the Constitution every person charged with a criminal offence shall be permitted to defend himself before the Court in person or, at his own expense, by a legal representative of his own choice and by sub-article (*e*) to be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the Court. The only issue is therefore whether the first appellant was deprived of that right through no fault of his own and through no fault of his counsel and, if so, whether the conviction should be quashed.

The facts are set out in the record and in an affidavit sworn by Mr. Kirenga on December 10, 1968 and his supplementary affidavit sworn on January 10, 1969. The facts deponed to in those affidavits have not in any way been challenged by the State Attorney and I shall therefore accept them as a true history of what occurred.

According to the record on September 10, 1968,

> "Echaku for prosecution.
>
> 3 accused present.
>
> P.N.G.
>
> A.3 Paulo says, 'I have Kirenga as my advocate'. My clerk informs me that he phoned to say he cannot come for this case as he is engaged in the High Court.
>
> Echaku – All my witnesses are here.
>
> Order: In these circumstances I shall proceed with the trial."

Mr. Kirenga was never briefed by the third appellant but had been briefed by the first appellant. This was supported at the hearing of the appeal by the third and first appellants and also in the said affidavits of Mr. Kirenga. This constituted a fundamental error as far as the first appellant was concerned as the magistrate was not even aware of the fact that the first appellant wished to be legally represented.

I accept Mr. Kirenga's affidavits that Mr. Kirenga received a telephone message from the Masaka Court clerk in the morning of September 10, 1968 that the case was to be heard in Masaka that day and that he replied that he could not attend as he was engaged in the High Court that day in Kampala. Here again it is clear from the record that the magistrate was misled by his court clerk into believing:

(*a*) that Mr. Kirenga was fully aware of the hearing date; and

(*b*) that he was not going to attend court because of another engagement he considered of more importance.

If that had been the true state of affairs I would have had every sympathy with the magistrate and if I had been in a similar position I would have allowed the prosecution to continue.

In fact Mr. Kirenga had been briefed in June 1968 to appear to defend the first appellant and had written informing the police of that fact on June 11, 1968 requesting the police to send him a copy of the charge sheet and any statement made by the first appellant. That request was complied with and the police were well aware of the fact that Mr. Kirenga would expect in due course to be notified of the hearing date as the first appellant was and had been in custody since the middle of May 1968.

It is not customary in the magistrates' courts in Uganda to maintain a "running list" of cases but to fix specific dates for hearing. It is not necessary to go into the reasons for the difference between the procedure in Uganda and in England as it is a matter of record that on September 5, 1968 the learned magistrate recorded:

> "Further remanded till 10th September, 1968 for trial."

There is no record that the accused were present or even informed of the hearing date until they were brought to court on September 10, 1968 to stand their trial.

I have no doubt the magistrate was under the impression that his clerk or the prosecution had promptly informed Mr. Kirenga of the hearing date and Mr. Kirenga had at the last moment phoned and said he was not coming. Be that as it may, as far as the first appellant and Mr. Kirenga were concerned, Mr. Kirenga received the first notice of the hearing date on the morning of the trial.

Masaka is a matter of over 80 miles from Kampala and quite apart from Mr. Kirenga being engaged in the High Court it is quite unreasonable to expect a professional man to drop all appointments and duties at the drop of a hat and hasten 80 miles by road to defend a client, and I am convinced that the magistrate would not have even considered requesting him to do so if he had been aware of the true facts. It is unfortunate the magistrate did not question the prosecutor as to whether Mr. Kirenga had received due notice, but he obviously assumed he had been so notified as otherwise Mr. Kirenga would not allegedly have phoned the court clerk.

For these reasons it appears to me clear that the first appellant was unwittingly deprived by the magistrate of his constitutional right to be legally represented. Although the trial lasted several days the magistrate, in apparent ignorance of the facts, failed to rectify the matter.

The position is somewhat similar to the facts in *Galos Hired v. R.*, [1944] 2 All E.R. 50, a Privy Counsel decision which was referred to in a later judgment of the Court of Criminal Appeal, *Kingston v. R.* (1948), 32 Cr. App. R. 183 at p. 189 by Humphreys, J., as follows:

> "The case comes somewhat near a case which was tried in the Privy

> Council in 1944, *Galos Hired and Another v. The King*, [1944] A.C. 149. The appeal came from the Somaliland Protectorate, and the headnote reads: 'Where, pursuant to subsection 2 of section 3 of the Poor Persons Defence Ordinance, 1939, an advocate was assigned to the appellant "for the preparation and conduct" of his appeal against his conviction of murder, and the advocate, through no default on his part, was unable to reach the court in time to conduct the appeal, which was conducted by the appellants in person and dismissed: Held, that the appeal had not been effectively heard and must be restored for hearing in circumstances which would enable an advocate to conduct it.' The reason in that case why the advocate was unable to appear was because of the war; he had to go by ship from one place to another and there was no ship available. It was not his fault in the slightest degree, and apparently he was the only member of the Bar who was available at all in that particular part of His Majesty's Dominions. In the course of delivering the judgment of the Privy Council, Lord Maugham said as follows (at p. 155): 'The importance of persons accused of a serious crime having the advantage of counsel to assist them before the courts cannot be doubted by anybody who remembers the long struggle which took place in this country and which ultimately resulted in such persons having the right to be represented by counsel: see Holdsworth, History of English Law, Vol. IX, pp. 226 et seq. This is a much stronger case. Just as a conviction following a trial cannot stand if there has been a refusal to hear the counsel for the accused, so, it seems to their Lordships, an appeal cannot stand where there has been a refusal to adjourn an appeal in which the appellant was entitled as of right to be heard by a counsel, assigned to him by the government, who was unable, without any default on his part, to reach the court in time to conduct the appeal.' The appeal was then allowed, steps being directed to be taken to restore the appeal for hearing so that an advocate could attend."

Both those decisions were followed in principle by Bennett, J., in his judgment in *Yusuf Gitta v. R.*, [1959] E.A. 211 in which one of the grounds of appeal was similar to the first ground in the instant appeal of the first appellant. The facts were however quite different and the judge's reason for dismissing the appeal on that issue were summed up as follows at p. 212:

> "Finally, it was contended that the refusal of the learned magistrate to adjourn the hearing so as to enable the appellant to be legally represented constituted a miscarriage of justice. The appellant was first brought before the court on December 10, 1958, when the hearing date was fixed for January 5, 1959, and he was released from custody on his own recognizance. On January 5, 1959, when the case was called on for hearing, the appellant produced a letter from an advocate, Mr. Kiwanuka. In the letter Mr. Kiwanuka said that he had been instructed by the appellant and requested an adjournment on the grounds that he was engaged in another court on that particular day. As all the prosecution witnesses were present and the prosecution was ready to proceed, the magistrate refused an adjournment and the case proceeded to hearing. Every accused has the undoubted right to be defended by counsel, *Galos Hired and Another v. R.*, [1944] A.C. 149, and *Kingston v. R.*, 32 Cr. App. R. 183, may be regarded as authority for the proposition that if an accused is deprived of that right through no fault of his own and through no fault of his counsel and a conviction follows, the conviction will be quashed on appeal. In the instant case it cannot be said that the appellant was deprived of the right to be represented by counsel through no fault of his own. It is apparent from Mr. Kiwanuka's affidavit that when he wrote a letter dated January 5, 1959, asking the magistrate for an adjournment, he had only just been instructed by the

> appellant. The appellant had, in fact, been at liberty for nearly a month prior to January 5 and so had had ample opportunity to instruct an advocate long before January 5, the date fixed for the hearing of his case. It is plain that the substantial cause of the appellant not being represented by an advocate at his trial was the appellant's failure to instruct an advocate till the eve of the trial. A contributory cause was the failure of the appellant's advocate to do his duty to his client. That duty is aptly described in the following passage from the judgment of the Court of Criminal Appeal in *Kingston v. R.*:
>
> > 'We have had a report in this case from the learned Recorder of Manchester, and it is quite clear from that report that the primary cause of this unfortunate situation was the failure of the counsel who had been briefed to do his duty to his client and the court in attending when the case was in the list for trial. If he was unable for any good reason to attend, his duty, as everybody knows, was to see that some other member of the bar held his brief and was in a position to represent the accused person'."

In the instant appeal the counsel for the first appellant had not in any way failed in his duty to his client, and even if his client had been informed of the date fixed for the hearing he had no facilities for communicating with his counsel.

The State Attorney has contended that the first appellant was fairly tried and cross-examined witnesses and there has not in fact been any miscarriage of justice, nor has counsel for the first appellant put forward any specific complaints as to the conduct of the trial. This may well be so, and I am not insensible of the provisions of s. 331 (1) of the Criminal Procedure Code which reads:

> "The appellate court on any appeal against conviction shall allow the appeal if it thinks that the judgment should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that it should be set aside on the ground of a wrong decision on any question of law if such decision has in fact caused a miscarriage of justice, or on any other ground if the court is satisfied that there has been a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the court shall, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers no substantial miscarriage of justice has actually occurred."

In the *Kingston* case the appellate court was satisfied that the appellant had made it clear that she was not going to defend herself at her trial and had relied on being represented by counsel. She had not cross-examined any witnesses and the Assistant Recorder had not allowed counsel to be briefed in court as a "dock brief". If it had not been for those facts they would not have allowed the appeal as they would not have been satisfied there had been any miscarriage of justice. That expression of opinion appears to me to have been obiter and contrary to the principle enunciated in the *Galos Hired* decision of the Privy Council. In that appeal the appellant had had the opportunity of addressing the appellate court in British Somaliland and did in fact do so. Despite this it was held that the appeal had not been effectively held as the appellant had been deprived of his statutory right to be represented by counsel in the same way as in this appeal the first appellant had been deprived of his constitutional right to such representation.

It therefore appears to me that the defect in this case is a fundamental defect or irregularity which vitiates the trial of the first appellant and I would not be justified in what would amount to defeating the first appellant's constitutional

rights by canvassing a further issue as to whether it has in fact led to any miscarriage of justice or is curable under s. 347 of the Criminal Procedure Code.

For these reasons I hold that the conviction cannot stand as the trial of the first appellant was not effectively held. The conviction is therefore quashed and the sentence set aside.

I must now decide whether the first appellant should be released or a retrial should be ordered. The principles upon which a retrial should be ordered are set out in the Court of Appeal judgment *Fatehali Manji v. The Republic*, [1966] E.A. 343 at p. 344:

> "The question for decision in this appeal is whether the order for retrial was justified or not. Section 319 (1) (*a*) (i) of the Criminal Procedure Code of Tanganyika, under which the order for retrial must have been made, appears to give the High Court on appeal an unlimited discretion as to ordering a retrial but, as was pointed out in *Ahmedi Ali Dharamsi Sumar v. Republic*, ([1964] E.A. 481 at p. 482), quoting excerpts from the judgment in *Salim Muhsin v. Salim Bin Mohamed and Others* [(1950), 17 E.A.C.A. 128], '. . . discretion must be exercised in a judicial manner and there is a considerable body of authority as to what is and what is not a proper judicial exercise of this discretion'. We will not quote the other passages in full but we will content ourselves with stating the principles which emerge from them. They are the following: in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."

I have already held that the trial of the first appellant was defective and as I consider it would be in the interests of justice that he be retried I order that he be retained in custody and retried by a court of competent jurisdiction but by a magistrate other than the trial magistrate.

Order accordingly.

For the appellant:
ES Kirenga
Kazoora & Co, Kampala

For the respondent:
PS Ayigihuga (State Attorney, Uganda)
Deputy Public Prosecutor, Uganda

Pirbhai Lalji & Sons Ltd v Hassanali Devji
[1969] 1 EA 439 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	26 March 1969
Case Number:	269/1962 (64/69)

Before: Russell J

Sourced by: LawAfrica

[1] Civil Practice and Procedure – Want of prosecution – Dismissal of action – Grounds for – Delay by plaintiff – Civil Procedure Rules, O. 15, *rr.* 2, 5 *and* 6 (*U.*).

[2] Civil Practice and Procedure – Dismissal of action – Whether party may apply under Civil Procedure Rules, O. 15, *r.* 6 (*U.*).

Editor's Summary

This suit was filed in April 1962 and was fixed for hearing in February 1964. It was adjourned by consent and relisted for June 1964. It was adjourned by the Court and no further step taken by either party until in February 1969 the defendant applied to have it dismissed for want of prosecution.

Held –

(i) since the suit had been set down for hearing O. 15, r. 5, Civil Procedure Rules ceased to apply;

(ii) a party to the suit has no right to apply to dismiss a suit under O. 15, r. 6, Civil Procedure Rules (*Nilani v. Patel and others* (4) not followed);

(iii) the Court would dismiss the suit in exercise of its own powers under O. 15, r. 6, Civil Procedure Rules.

Suit dismissed.

Cases referred to in judgment:

(1) *Ahmed Hassam Mulji v. Shirinbhai Jadabji*, [1963] E.A. 217.

(2) *Saldanha and Others v. Bhailal & Co. and Others*, [1968] E.A. 28.

(3) *Allen v. Sir Alfred McAlpine & Sons*, [1968] 1 All E.R. 543.

(4) *Nilani v. Patel and Others*, [1969] E.A. 340.

Judgment

Russell J: This is a notice of motion applying for the plaintiff's suit to be dismissed for want of prosecution pursuant to O. 15, r. 6.

The history of this suit is briefly that a plaint was filed in April 1962 under Summary Procedure Order 33. Judgment was entered on May 7, 1962 *ex parte* as it was alleged the defendant had failed to make an application for leave to appear and defend the action within the prescribed period. That *ex parte* judgment was however set aside and the defendant was granted leave to appear and defend. The defence was duly filed in December 1962 and the suit was set down for hearing on February 26, 1964.

The suit was removed from the hearing list by consent but at the instance of the plaintiff and a fresh hearing date was fixed for June 29, 1964. The suit was again removed from the hearing list by consent at the instance of the plaintiff's advocates and a fresh hearing date was fixed for October 22, 1964. The suit

was finally withdrawn from the hearing list for the convenience of the Court and no further steps were taken by either party until the instant notice of motion was filed on February 21, 1969 applying for dismissal of the suit for want of prosecution.

Order 15, r. 5 provides that in the event of a plaintiff failing to set down a

suit for hearing within eight weeks of the delivery of any defence, the defendant is entitled either to set the suit down for hearing or to apply to the Court to dismiss the suit for want of prosecution, and on the hearing of such application the Court may order the suit to be dismissed accordingly or may make such other Order, and on such terms, as the Court may see just.

In the present suit the plaintiff did in fact set the suit down for hearing and as soon as this had been done it appears to me that the said r. 5 ceased to have any further application. Although not specifically stated, the effect of removing the suit from the hearing list for October 22, 1964 was to adjourn the hearing sine die.

There is however a further provision in O. 15, r. 2 which provides that when a suit has been adjourned generally the Court may, if no application is made within twelve months of the last adjournment, give notice to the parties to show cause why the suit should not be dismissed and if cause is not shown to the satisfaction of the Court the suit shall be dismissed. It is to be observed that the initiative under this rule is on the Court and that due notice must be given by the Court to the parties to show cause.

Order 15, r. 6 provides that in any case, not otherwise provided for, in which no application is made or step taken for a period of two years by either party with a view to proceeding with the suit, the Court may order the suit to be dismissed. In such case the plaintiff may, subject to the law of limitation, bring a fresh suit. It is to be observed that this enables the Court of its own initiative, without notice to either party, to dismiss the suit after what is *prima facie* an inordinate delay of two years.

It has been held in several suits in Kenya under their relevant Civil Procedure Rules, which correspond to our Rules, that if provision is made in the Civil Procedure Rules for applications for the dismissal of suits for want of prosecution the Court has no inherent jurisdiction under the Civil Procedure Code: *Ahmed Hassan Mulji v. Shirinbai Jadabji*, [1963] E.A. 217 and *Saldanha and Others v. Bhailal & Co. and Others*, [1968] E.A. 28.

I have perused with interest the ruling of Dickson, J., in *Nilani v. Patel and Others*, [1969] E.A. 340, in which he allowed a somewhat similar application at the instance of the defendants, and although I respectfully agree with the ruling in substance I am not satisfied a defendant is entitled to move the Court under O. 48, r. 1 to dismiss a suit for want of prosecution pursuant to O. 15, r. 6.

It appears to me that the present application was misconceived as under O. 15, r. 6 the Court may on its own initiative order a suit to be dismissed for want of prosecution provided the defendant is not entitled to make such application under some other provision in the Civil Procedure Code or Rules. If a defendant is aggrieved at the failure of a plaintiff to set a suit down for hearing within eight weeks after the pleadings have been closed he may apply to the Court to dismiss the suit. After a suit has been set down for hearing but adjourned generally and the plaintiff fails to set it down for hearing within twelve months, he may request the Court to issue a notice to show cause why it should not be dismissed. After the plaintiff has failed for a period of two years to make any application or take any step the defendant is entitled to direct the attention of the Court to the plaintiff's said failure by notifying the Registrar and requesting him to place the matter before a Judge for consideration.

This application has however had the effect of directing my attention to the inordinate delay on the part of the plaintiff in setting the suit down for hearing after it had been adjourned generally and it has also given the plaintiff an opportunity of showing reasonable cause for the delay.

An affidavit of Mr. A.P. Lalji, a director of the plaintiff company, was filed

on behalf of the plaintiff and the only reason which he gives for the delay is set out in paragraph 3, which reads as follows:

> "Since 1965 the defendant has been unwell and I believe has no means to satisfy the decree that might be passed against him. In order therefore not to incur further costs the plaintiff decided to take no further action until his condition had improved."

Mr. Vyas has very rightly pointed out that the grounds for Mr. Lalji's belief were not set out as prescribed by O. 17, r. 3 (1) and that the affidavit, in any event as far as that paragraph is concerned, should not be accepted by the Court. This is however a borderline case as the deponent merely states that he believed the defendant had no means to satisfy the decree and that is a state of mind which can well be accepted as a fact which can be deponed to by Mr. Lalji. Even if Mr. Lalji's reason for the inordinate delay is accepted I do not consider that it discloses a reasonable ground for failure to take any steps to prosecute the action for over four and a half years. Although the defendant had the right to set down the suit for trial it was not incumbent on him to do so as it might only have involved him in further and unnecessary costs. He was entitled to sit back and in due course make an application for dismissal of the suit for want of prosecution: *Allen v. Sir Alfred McAlpine & Sons*, [1968] 1 All E.R. 543 at page 555, per Diplock, L.J.

The issues in this suit reach back to accounts for goods sold and delivered between May 1955 and March 1956 and a defence of limitation of action was set up. Justice delayed is justice denied and I can find no reasonable justification for the delay. Under these circumstances the suit will be dismissed pursuant to the provisions of O. 15, r. 6, but there will not be any order as to costs.

Suit dismissed.

For the plaintiff:
A Ishani
A Ishani, Kampala

For the defendant:
MP Vyas
MP Vyas, Kampala

Mukasa v Singh and others
[1969] 1 EA 442 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	2 April 1969
Case Number:	400/1968 (65/69)
Before:	Sheridan Ag CJ
Sourced by:	LawAfrica

[1] Civil Practice and Procedure – Particulars – Particulars of negligence – Must be pleaded.

[2] Civil Practice and Procedure – Plaint – Striking out – No particulars of negligence – Plaint rejected – Civil Procedure Rules, O. 7, *r.* 11 (*U.*).

[3] Civil Practice and Procedure – Res ipsa loquitur – Particular of negligence must be pleaded before doctrine can apply.

[4] Civil Practice and Procedure – Negligence – Particulars must be pleaded.

Editor's Summary

The plaintiff must first plead the particulars of negligence on which he relies, and which will be binding on him, before he can shift the onus of disproving negligence onto the defendant.

Plaint rejected.

Cases referred to in judgment:

(1) *Scott v. London & St. Katherine Docks* (1865), 3 H. & C. 596; [1861–73] All E.R. Rep. 246.

Judgment

Sheridan Ag CJ: This is an application by Chamber Summons under O. 7, r. 11 (*a*) of the Civil Procedure Rules, for the first respondent's/plaintiff's claim to be dismissed on the ground that the plaint does not disclose a cause of action.

Mr. Sebalu, for the first respondent, has taken the point that under O. 7, r. 11 (*a*) the application should have been for the rejection of the plaint, which would have left it open to the first respondent to present a fresh plaint under O. 7, r. 13 in respect of the same cause of action, whereas a dismissal of the suit would be final. Although the wording of the summons is wrong the application is clearly brought under O. 7, r. 11 and I do not think it should be dismissed for that reason; but, subject to Mr. Sebalu's undertaking to amend the plaint by supplying particulars of negligence, the only effective order I could make on the present application would be to reject the plaint.

The offending paragraph of the plaint is:

> "4. The Plaintiff was the husband of the deceased and they were living together. On 27th May, 1967, the deceased Mary Namakula was a passenger in motor vehicle No. USU 918. The Defendants' servants and/or agents and Defendant No. 3 at about miles 7 Kampala/Bombo Road, drove their respective vehicles so negligently that they collided and as a result of the accident Mary Namakula died from injuries she sustained in the accident.
>
> *Particulars of Negligence*
>
> The weather was clear, the road was tar macadam and straight, the road

was dry and in good repair, and traffic was light, yet the vehicles collided. Under the circumstances, the Plaintiff relies on the doctrine of res ipso (*sic*) loquitur."

Mr. Hunt, for the applicant, submits that particulars of negligence must be pleaded. He relies on Atkin's Court Forms & Precedents (12th Edn.), p. 36. Even in a suit where the doctrine of res ipsa loquitur is going to be invoked it is necessary to plead particulars of negligence. See precedent 28 at p. 44.

"Claim for injuries sustained on the highway by chattels falling from the defendant's premises.

(Heading and formal parts as in Form No. 20.)

1. The plaintiff resides and carries on business as a . . . at . . . in the County of . . . The defendant is the occupier of premises abutting on the highway at . . . in the said County.

2. On or about the . . . day of . . . 19 . . ., the plaintiff was lawfully walking along the said highway past the defendant's said premises when owing to the negligence of the defendant his servant or agent (a sack of flour) fell therefrom and struck and injured the plaintiff whereby he has been put to loss and expense and has suffered damage.

(A) *Particulars of Negligence*

The defendant was negligent in that he –

(i) threw the said (sack) on to the said highway with knowledge or means of knowledge that it might cause injury to people thereon;

(ii) with knowledge or means of knowledge as aforesaid caused or permitted the said (sack) to fall upon the said highway;

(iii) failed to keep any or any proper lookout or to have regard for persons using the said highway.

3. The plaintiff will also rely on the fact that the said premises and the said sack were at all material times under the management of the defendant or his servants and that the accident was such as in the ordinary course of things would not have happened if those who had such management had used proper care."

It is not enough to plead the mere fact of an accident between three motor vehicles on the highway. Nor do the bare words "drove their respective vehicles so negligently that they collided and as a result of the accident Mary Namakula died from injuries she sustained in the accident" in paragraph 4 save the plaint.

The doctrine of res ipsa loquitur is concerned with the onus of proof and is not a substitute for proof of negligence. In certain cases it is possible for the plaintiff to reply on the mere fact that something happened as affording a *prima facie* case – evidence of negligence on the defendant's part. In *Scott v. London & St. Katherine Docks* (1865), 3 H. & C. 596, per Erle, C.J., at p. 601:

"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

The plaintiff must first plead the particulars of negligence on which he relies, and which will be binding on him, before he can shift the onus of disproving negligence onto the applicant.

I do not think I can accept Mr. Sebalu's offer to amend the plaint. It will

have to be entirely recast to disclose a cause of action. The plaint is rejected with costs.

Order accordingly.

For the applicant:
RE Hunt
RE Hunt, Kampala

For the first respondent:
LKM Sebalu
LKM Sebalu, Kampala

For the second and third defendants:
MA Patel
Patel and Shah, Kampala

Abdalla v Mohamedi and others
[1969] 1 EA 444 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	12 April 1969
Case Number:	51/1968 (66/69)
Before:	Sir Charles Newbold P, Duffus and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanzania – Kimicha, J

[1] Customary Law – Land – Rights of occupation – Wazaramo parties occupying Government Preserved land – Whether Zaramo customary law to be applied between parties – Whether trespassers as against Government.

[2] Land – Customary law – Rights of occupation in issue between Wazaramo occupying Preserved land – Whether Zaramo customary law to be applied.

[3] Land – Government Preserved land – Occupied by tribe – Whether tribe trespassers – Whether implied licence from Government to occupy land – Public Land (*Preserved Areas*) *Act* (*Cap.* 338) (*T.*).

Editor's Summary

The parties to a suit over a right to occupy certain Government Reserved land were Wazaramo, and the Kadhi's Court, applying Zaramo customary law, found for the defendants. The plaintiff appealed to the

Regional Local Courts Officer who ordered the defendants to pay the plaintiff compensation "for extinction of his rights" in the land. The plaintiff then appealed to the High Court where Kimicha, J., restored the decision of the Kadhi and held that, since the land was Government land, customary law did not apply and that the parties and their predecessors were all trespassers who could not acquire or transmit any rights in the land. The plaintiff then brought this appeal to the Court of Appeal.

Held –

(i) the rights of the parties as between themselves as occupiers of the land must be governed by their customary law;

(ii) the parties were not trespassers but held the land on an implied licence from the Government;

(iii) on the facts, the decision of the Kadhi was correct.

Appeal dismissed. No order for costs.

No cases referred to in judgment

April 12, 1969. The following considered judgments were read:

Judgment

Law JA: The case giving rise to this appeal began in 1962 as a suit in the court of the Kadhi in Dar-es-Salaam. The present appellant (to whom I shall refer as Abdalla) was the plaintiff, and he claimed from one Mwinyigoha

a piece of land which he said he had inherited from his father, Chapila, but which he alleged was being unlawfully occupied by Mwinyigoha who was Chapila's nephew.

Mwinyigoha's defence was that the land was Government land which he and his family had cleared and occupied for many years. The land in dispute was visited by the Kadhi and described by him as follows:

> "The plaintiff identified the piece of land he claims on which two houses belonging to the defendant stand. In it there are 2 – 3 coconut trees, 2 – 3 paw-paw trees, a few banana stems, a few mango trees, a few cashew-nut trees and a graveyard."

The parties to the suit were Wazaramo, and the suit was decided in accordance with Zaramo customary law. In the course of a long and carefully considered judgment the learned Kadhi said:

> "The land in dispute is, in fact, Reserved land. Formerly it was mere bush. The people who entered the land first found it unoccupied and each set out to clear his own piece of land and planted trees. Those who came in later were received by the pioneers and each chose an area, cleared the bush and built on the land he cleared. In fact they only own the trees and not the land. This is what Mganda did to Chapila, and what Chapila and others subsequently did, including the defendant. The defendant has lived on that land for a long period, before the plaintiff was born. Right now he has his two houses on it together with coconut, lemon and cashew-nut trees among other things.
>
> Having examined and carefully weighed all the evidence I am satisfied that the area in dispute belongs to the defendant in that he is the one who first cleared the bush and subsequently lived there for over forty years. In the result I hold that the defendant is entitled to remain in possession of the land just like anybody else in the area which is, in fact, Government Reserved land."

Being dissatisfied with this determination, Abdalla appealed under the procedure then in force to the Regional Local Courts Officer, Mr. W. A. Brooks. When the matter reached Mr. Brooks towards the end of 1963, Mwinyigoha had died, and his six children, the present respondents, were substituted as respondents. It was agreed before Mr. Brooks that Zaramo customary law applied.

The matter was carefully investigated by Mr. Brooks who came to the conclusion that Abdalla had an interest in the disputed land which would normally be satisfied by his being given, by agreement, a portion of it. As there was no possibility of agreement, Mr. Brooks decided that the respondents should pay Abdalla the sum of Shs. 1,000/- "for extinction of his rights there". This partial victory did not satisfy Abdalla, who appealed to the High Court, where the appeal was argued in August and September 1965 before Kimicha, J. The learned judge allowed the appeal and restored the Kadhi's judgment dismissing the suit, but on different grounds. He held that, as the land in dispute was Government land, customary law did not apply to the suit; and he also held that all the parties and the persons from which they claimed to derive rights to the land were trespassers who had not in fact or in law acquired any rights either personally or which could be passed to their heirs.

In 1967 Abdalla obtained leave from the High Court to appeal to this Court, and to do so in forma pauperis. At the hearing of the appeal Abdalla appeared in person, and the respondents were represented by the first respondent Mohamedi Mwinyigoha, to whom I shall refer henceforth as Mohamedi. We

also had the assistance of Mr. Makani, Senior State Attorney, as amicus curiae. Mr. Makani supported Kimicha, J.'s finding that the parties to the suit and their predecessors were trespassers, on the ground that the land in dispute was land within a preserved area to which the parties could show no registrable title under s. 5 of the Public Land (Preserved Areas) Act (Cap. 338). Mr. Makani submitted, however, that, so long as the parties were allowed to remain in occupation of the land by Government, their rights and liabilities inter se as occupiers of the land must be governed by their customary law. With this latter proposition I entirely agree. The learned judge's opinion that considerations of customary law must be excluded in this case was based, in my view, on a misunderstanding of the position on his part. This litigation does not concern the ownership of the land, which it is common ground belongs to the Government, but to the right to occupy the land by members of a tribal unit which has been in occupation thereof for two generations or more. I have no doubt that customary law does apply to disputes amongst such members relating to such occupation. I also find myself unable to agree with the learned judge and Mr. Makani that the parties to this suit and their forebears are, and always were, trespassers. Their presence on the land for fifty years or more cannot have gone unnoticed by the Government, and they must in my opinion be considered as occupying, and having occupied, the land with an implied licence from the Government to do so until such time as it pleases the Government to terminate such licence. To hold otherwise would have the consequence of branding the majority of the population of Tanzania, who occupy public land in preserved areas as tribal units, as trespassers who are in unlawful occupation of the land, which for generations past may have been their home.

This appeal should therefore be approached, in my view, on the basis that the parties are not in unlawful occupation of the land and that Zaramo customary law applies to their dispute. Abdalla's case, as expounded by him, is that his father, Chapila, cleared the land, planted trees on it, and invited his kinsman Mwinyigoha to occupy it. Mohamedi's case is that his father, Mwinyigoha, occupied an area that was bush, and that he cleared it, planted trees, and built houses on it. The learned Kadhi's findings support Mohamedi's case. Abdalla also made the point that the graves of his father and mother are on the disputed piece of land, but as it appears that the graveyard also contained the graves of Mohamedi's father Mwinyigoha and of other kinsmen of Mohamedi, this is a neutral factor in the case which does not benefit either side. The Kadhi, and Mr. Brooks, both stated that as a general rule the right to occupy land is vested in the man who cleared it and his descendants. The Kadhi, who heard a considerable volume of evidence and visited the scene, found as a fact that it was Mwinyigoha who first occupied the disputed piece of land and cleared it. I am content to accept this finding in preference to Abdalla's contention that it was his father Chapila who first occupied and cleared the land, as Abdalla was only six months old when Chapila died and has no personal knowledge of the facts. For these reasons I agree with the learned judge, although for different reasons, that the Kadhi's decision should be restored and judgment entered for the respondents. I would dismiss this appeal, and make no order for costs as the appellant is a pauper.

Duffus JA: The facts in this appeal have been fully set out in the judgment of Law, J.A. It is common ground that the land in dispute belongs to Government although the parties in this case and their ancestors have lived on this land for a considerable period. The Government were not a party to this suit and the question as to the rights of the parties as against the Government in so far as the ownership of the land is concerned has never been an issue and cannot be determined in this case. It is, however, clear that the parties and their ancestors have been in apparent lawful occupation of the land for

very many years without having been disturbed by the Government. The parties agreed at the hearing before the Regional Local Courts Officer that Zaramo customary law was to be followed.

I entirely agree with Law, J.A., that the rights of the parties as between themselves in so far as their occupation of the land is concerned must be decided in accordance with Zaramo customary law and I also agree that the carefully considered judgment of the Kadhi in the trial court should be preferred to the judgment of the Regional Local Courts Officer on appeal. With respect I have had some difficulty in understanding the judgment of the Regional Local Courts Officer and I can find no good reason for his alteration of the original judgment of the Kadhi, a judgment which appeared to be fair and equitable and to be in accordance with customary law. I therefore agree with LAW, J.A., that the judgment of the learned judge of the High Court be upheld, although not for the reasons stated by the learned judge, and accordingly that this appeal be dismissed. I also agree with his order for costs.

Sir Charles Newbold P: I have had the advantage of reading in draft the judgment of Law, J.A., and I agree with it. There will be an order in the terms proposed by him.

Appeal dismissed. Decision of Kadhi restored and judgment entered for the respondents.

The appellant and the respondents in person.

As amicus curiae:
BN Makani (Senior State Attorney, Tanzania)
Attorney-General, Tanzania

Pioneer Garage Ltd v Barclays Bank D C O
[1969] 1 EA 447 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	3 April 1969
Case Number:	46/1968 (67/69)
Before:	Duffus, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda – Jones, J

[1] Damages – Several tortfeasors – Loss as a result of acts of two or more persons – Whether plaintiff can recover from one such person to full extent of that person's liability, or whether plaintiff must allow deduction for money recovered from another.

[2] Tort – Loss caused by several tortfeasors – Partial recovery from one – Whether a reduction of liability of other tortfeasors.

Editor's Summary

The appellant had been defrauded of Shs. 148,000/- by an employee who had diverted the appellant's funds to his own account with the respondent bank. The employee had refunded Shs. 24,000/- to the appellant. The appellant sued the bank for Shs. 93,200/-. The trial judge found that the bank had been negligent in respect of frauds to the value of Shs. 48,100/-. He then deducted from that sum Shs. 36,000/-, which was the amount which the bank had pleaded had been recovered from the employee, but which figure had not been proved. On appeal it was argued for the appellant that there should be no deduction

from the damages awarded on account of payment from another tortfeasor unless the payment reduced the total loss below the figure claimed.

Held –

(i) a person who has suffered loss as a result of the acts of two or more persons is entitled to recover from any one of the tortfeasors to the full extent of that person's liability;

(ii) the bank was not entitled to a deduction from the damages awarded against it.

Observations by Duffus, J.A., on the possible effect of a repayment by the employee in respect of a particular defalcation.

Appeal allowed.

No cases referred to in judgment

April 3, 1969. The following considered judgments were read:

Judgment

Spry JA: The appellant company was defrauded by one of its employees, who diverted funds belonging to the company, which should have been paid into the company's account with the respondent bank, to his private account with that bank. It sued the bank, presumably in debt, for the sum of Shs. 93,200/- and interest or, in the alternative, for damages for negligence. The bank denied liability, adding a submission that if it should be held liable, the amount of its liability should be reduced by Shs. 36,000/- which the company had recovered from the defaulting employee.

The trial judge decided the suit on the basis of negligence. He found that the frauds fell into two classes and held that the bank had been negligent in respect of one class but not in respect of the other, and he initially awarded the sum of Shs. 47,100/- as damages. It was agreed, when the decree was drafted, that this figure was based on an arithmetical error and a revised figure of Shs. 48,100/- was substituted.

Neither counsel addressed the trial court on the question whether there should be a deduction from this sum in respect of the money the company had recovered. This, and all the consequences, including this appeal, appear to be due to the failure of the trial court to frame issues, in accordance with O. 13, r. 1 (5) of the Civil Procedure Rules.

The learned trial judge dealt with this question as follows:

> "I am of the opinion, that the defendants are entitled to have the benefit of any payments made to the plaintiffs by the architect of these frauds when calculating their liability. I order that the sum of Shs. 36,000/-, therefore, be deducted from the amounts which ought to have been properly credited to the plaintiff's account, had their servants not been negligent . . ."

The reference to Shs. 36,000/- is a patent error. That figure appears in the pleadings, it is true, but not in the evidence, as was conceded by counsel for the bank. The only evidence on the subject was given by a director of the company, who said in cross-examination and confirmed in re-examination that the amount recovered was Shs. 24,000/-, handed over to the company by the defaulting employee's advocate.

The only question for decision in this appeal is whether the trial judge was entitled when assessing the damages to deduct the amount recovered by the company. He gave no reasons for doing so, and neither Mr. Wilkinson, who appeared for the company, nor Mr. Keeble, who appeared for the bank, was able to refer us to any relevant authority.

Mr. Wilkinson submitted that a tortfeasor cannot avoid liability for his negligence by showing that another tortfeasor has made a payment towards a larger liability, although he conceded that such a payment might be relevant if it reduced the injured party's loss below the figure for which the first tortfeasor would otherwise have been liable. Mr. Keeble argued that in the circumstances of the present case, where the person who was primarily responsible for the loss and who had made the partial repayment was the servant of the company, it was reasonable and proper to allow the bank to set-off the full amount of the recovery, and he submitted in the alternative that the bank should at least be entitled to a pro rata deduction.

In my opinion, the bank is not entitled to any deduction based on the recovery. Where a person has suffered a loss as the result of the wrongful acts or omissions of two or more persons, whether they are joint or independent tortfeasors, he is entitled to recover his loss as damages from any one of those tortfeasors to the full extent of that person's liability. There is no question of set-off in these circumstances. An injured person cannot, of course, in the ordinary way, recover more than the amount of his loss, and if the amount of the recovery had been sufficient to reduce the loss below the amount for which the bank was potentially liable, the amount of damages would have been reduced accordingly. However, it is conceded that that does not arise in this case: the amount of Shs. 24,000/- recovered reduced the appellant company's loss and consequently the claim it is entitled to make against its former employee, but it did not affect the bank's liability for its negligence nor does it affect the measure of damages, since it does not reduce the company's loss below the amount for which the bank is liable.

I would allow this appeal, and order that the judgment and decree (which do not correspond) be amended by deleting the order for the deduction of Shs. 36,000/- from the basic amount of damages and by substituting the sum of Shs. 48,100/- as damages for the figures Shs. 11,100/- appearing in the judgment and Shs. 12,100/- in the decree. There has been no appeal against the orders for interests and costs, which accordingly stand. I would give the appellant company the costs of the appeal but I would not give a certificate for two counsel, although Mr. Keeble did not oppose the application for it.

Duffus JA: I have had the advantage of reading the judgment of Spry, J.A.

The trial judge found that the respondent bank, the defendant in the plaint, had been guilty of negligence in the issuing of the counterfoils for certain lodgments made to the bank, as a result of which an employee of the appellant company had been able to defraud the company of some Shs. 48,100/-. The evidence at the trial also established that the same employee caused a total loss to the company of Shs. 148,000/-, but that the employee had repaid Shs. 24,000/- to the company. In its pleadings the respondent bank pleaded that the employee had repaid Shs. 36,000/-, but this was denied by the appellant company in its reply.

The judge found that the bank was entitled to have this sum of Shs. 36,000/- deducted from the loss incurred by the company as a result of the bank's negligence and accordingly deducted this Shs. 36,000/- from the loss of Shs. 48,100/- assessed as the damages and finally awarded damages in the sum of Shs. 12,100/-. This appeal by the appellant company is limited only to a complaint against the deduction of this amount.

The whole issue in this case, in my view, depends simply on the onus of proof. The appellant company has been awarded Shs. 48,100/- for damages as the actual loss suffered as a result of the respondent bank's negligence. The

respondent bank claims that the amount of the loss should have been reduced by Shs. 36,000/-, being the amount paid by the defaulting employee. This payment is denied by the company and clearly the onus is on the bank to prove the payment.

The only evidence on this issue is that given by Mr. Khan Mohamed Awan, a director of the appellant company as follows:

> "I have recovered Shs. 24,000/- from Nathwani from his lawyer Gandesha.
>
> *Re*: *Examination:*
>
> The Shs. 24,000/- does not cover my losses which amounted to Shs. 148,000/-."

No other evidence was called and in my view this evidence cannot possibly establish that this Shs. 24,000/- was paid towards reducing the amount stolen by the defaulting employee as a result of the bank's negligence. There is no evidence to show the dates of all of the various defalcations or debts and no evidence to show that the employee had assigned the payment of Shs. 24,000/- to any particular defalcation or debt, nor that the creditor, the appellant company, had appropriated the payment to any specific account. The onus is on the bank to prove that the payment was made towards the loss for which it was held liable. This possibility was not even suggested to the company's director when he was being cross-examined, the payment could well have been made towards the remaining loss of Shs. 99,900/- suffered by the company. If in fact the bank had proved that this Shs. 24,000/- was paid in respect of the particular loss suffered by the company on account of its negligence then it could probably have been successfully argued that the damages should have been reduced accordingly, but there was, in my opinion, absolutely no evidence or even a suggestion in cross-examination that this was the position.

I therefore agree with Spry, J.A., that this appeal be allowed by amending the judgment and decree by deleting the order for the deduction of Shs. 36,000/- from the amount of damages and substituting the sum of Shs. 48,100/- as damages, and I also agree with his order of the costs of this appeal.

As Law, J.A., also agrees I would order that this appeal be allowed in accordance with the order set out in the judgment of Spry, J.A.

Law JA: I agree with the judgment prepared by Spry, J.A., which I have had the advantage of reading in draft, and I concur in the order proposed by him.

Appeal allowed.

For the appellant:
PJ Wilkinson, QC, Z Haque and *GH Gandesha*
Gandesha & Co, Kampala

For the respondent:
OJ Keeble
Hunter & Greig, Kampala

Kaggia and another v Republic

[1969] 1 EA 451 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	2 July 1968
Case Number:	582 and 583/1968 (44/69)
Before:	Farrell Ag CJ and Dalton J
Sourced by:	LawAfrica

[1] Criminal Law – Public order – Public meeting – Definition of – Public Order Act (*Cap.* 56), *s.* 2 (*K.*).

[2]Criminal Law – Public order – Public meeting – Holding public meeting – Public Order Act (*Cap.* 56), *s.* 5 (*K.*).

[3] Criminal Law – Sentence – Holding public meeting – Whether deliberate defiance.

Editor's Summary

The appellants were convicted of holding a public meeting which took place without a licence contrary to s. 5(11) (*a*) (ii) of the Public Order Act, and were sentenced to one year's imprisonment. The facts appear in the judgment of the court. The grounds of the appeal were that the meeting was not a public meeting and that the appellants did not hold it. The sentences were also appealed against.

Held –

(i) "public meeting" in s. 2 of the Public Order Act contains two definitions, one being any meeting held in a public place and the other being any meeting which the public or a section of the public or more than fifty persons are permitted to attend;

(ii) the evidence showed that the meeting was held in a shop with the doors wide open and no control over access. This was therefore a public place and the meeting was a public meeting;

(iii) "hold" in s. 5 (11) (*a*) (ii) does not necessarily involve forethought and planning;

(iv) there was some small degree of preparation by the appellants who also took charge of the proceedings after they arrived. They therefore held the meeting;

(v) the magistrate erred in holding that there was a deliberate and defiant disregard of the law and the sentences would be reduced to six months' imprisonment.

Observations on the principles on which an appellate court should act when the findings of fact of the trial court are called in question.

Appeals against conviction dismissed. Sentences reduced.

Cases referred to in judgment:

(1) *Canisio s/o Walwa v. R.* (1956), 23 E.A.C.A. 453.

(2) *D. R. Pandya v. R.*, [1957] E.A. 337.

(3) *Peters v. Sunday Post*, [1958] E.A. 424.

(4) *Watt v. Thomas*, [1947] A.C. 484.

Judgment

Farrell Ag CJ: read the following judgment of the Court: In these appeals which we have consolidated, the first appellant, Mr. Bildad Kaggia, is the Vice-President of the opposition party, the Kenya People's Union, and the second appellant, Mr. Ochok, is the Chairman of the Homa Bay branch of the party. The proceedings from which the appeals are brought arose out of a meeting which took place on February 17 this year at Muriu

Market, a shopping centre about ten miles from Kendu Bay in the South Nyanza District. On that morning it had been arranged to hold a ceremony to mark the opening of an office for the sub-branch of the party at Muriu Market, and Mr. Kaggia, who at the time was on holiday at Kendu Bay, was invited to attend the ceremony and meet the members of the sub-branch committee. The invitation from the committee members was conveyed to Mr. Kaggia by the second appellant who, although not a member of the sub-branch at Muriu Market, is a prominent member of the party in those parts.

Mr. Kaggia's party left Kendu Bay in two cars, and were closely followed by a party of police who had been instructed to keep a close watch on Mr. Kaggia's movements during his visit to South Nyanza. On arrival at Muriu Market the party alighted from the cars and proceeded to a shop which had been designated as the new office of the sub-branch. The party entered the shop and Mr. Kaggia was introduced to the committee members by Mr. Ochok.

Up to this point there is little conflict in the evidence, but as to what happened next, the stories told by the prosecution and the defence diverge. According to the prosecution, when Mr. Kaggia and his party arrived a large number of people, members of the general public, ran towards the shop and crowded inside, and others were left outside on the verandah where they could see and hear what was going on inside. Mr. Ochok then made a speech in Dholuo welcoming Mr. Kaggia, and Mr. Kaggia followed with a speech in Kiswahili. Both speeches were of a strongly political flavour. After Mr. Kaggia had spoken for about fifteen minutes Inspector Nyegenyi, the senior police officer present, indicated to him that he should stop, Mr. Kaggia promptly complied and thereupon Mr. Ochok asked people to leave. It is not disputed that the meeting dispersed in an orderly manner.

The defence version of the meeting differs in two material respects from the above account. First of all, it is denied that anybody was present in the shop except the ten persons comprising Mr. Kaggia's party and twelve to fourteen persons who were all committee members of the sub-branch, nor was there anybody else outside except the police officers who had followed the party from Kendu Bay. Secondly, it is denied that anything was said which had political significance; the speeches by the two appellants (so it is claimed) were solely concerned with the opening of the office for the sub-branch.

Under the Public Order Act (Cap. 56), no political meeting may be held without a licence first obtained from the District Commissioner. That is a simplification of the law, which we shall have to consider in some detail later in this judgment. It is common ground that no licence had been sought or obtained; and on the basis of the version of the events put forward by the police witnesses, the appellants were arrested later the same day and were charged in court on two alternative counts, the first of unlawfully holding a public meeting contrary to s. 5 (11) (ii) of the Public Order Act (to which we shall refer as "the Act") and in the alternative of taking part in an unlawful assembly contrary to s. 5 (11) (i) of the Act. They were convicted by the Resident Magistrate, Kisii, on the first count and each was sentenced to one year's imprisonment. They appeal to this Court against both conviction and sentence.

The issues which arise on this appeal are partly issues of fact and partly (and perhaps mainly) of law. We propose to deal with the facts and the evidence first.

The prosecution case, so far at any rate as the matters in controversy are concerned, rested on the evidence of three police officers who were members of the party which followed the appellants from kendu Bay. The first, Inspector Nyegenyi, is the Special Branch Officer for Nyanza District, and has fourteen years experience. The second, Sgt. Oyoo, is also attached to the Special Branch, and the third is a police constable. All three were present at the shop where the

meeting was held. Inspector Nyegenyi tried to get in at the door, but was, so he says, unable to do so because of the crowd. He was able, however, to see inside and to hear. He did not understand the speech of Mr. Ochok in Dholuo, but heard and understood Mr. Kaggia's speech in Kiswahili. According to him Mr. Kaggia spoke of free education, free medical treatment and free land, and he also urged the crowd to vote for K.P.U. candidates during the forthcoming local elections.

Sgt. Oyoo was slightly in front of the Inspector and just inside the room. Dholuo is his native tongue and he heard and understood Mr. Ochok's address. Mr. Ochok said that he had brought Mr. Kaggia to open their office. He told them to work hard and give their votes to K.P.U. candidates at the election. The people whom they sent to "Legco." went there for their own stomach.

Mr. Kaggia then followed and said that when he was at Thika he was beaten in front of the police. He told them to work hard as the K.P.U. wished people who would set others free. The Kenya Government was the government of America and Britain with whose countries Kenya traded. He spoke in derogatory terms of the Government's policies and went on to refer to the coming elections.

The constable was further away and only heard Mr. Kaggia's speech. He agreed with P.W.1 that Mr. Kaggia spoke of free education and free treatment. He said that the present Government is for big people like the D.C. and the P.C. He told the crowd to vote on the side they knew.

A good deal of the evidence of these witnesses, both in examination-in-chief and in cross-examination, was concerned with the number of people at the meeting, both inside and outside the shop. For reasons which we will come to later, we do not think this was a matter of any material significance. We note, however, the evidence of Sgt. Oyoo that some of the people were running from the market to see Mr. Kaggia, and that some of them entered the building while others stood near the door. This agrees substantially with the evidence of the constable that those who were outside came to the shop-building after Mr. Kaggia had come – "they sort of drifted into the shop-building from the market".

Each of these three police witnesses was rigorously cross-examined by Mr. Georgiadis in the lower court, and he has gone through their evidence in great detail in this Court in an effort to show that they were unworthy of belief. It was necessary for him to do so if he was to succeed in this appeal, since the learned magistrate has expressed his opinion in no uncertain terms that they were honest, fair and trustworthy witnesses whose evidence was worthy of credence.

The principles upon which an appellate court should act when the findings of fact of the trial court are called in question have been considered in a number of cases before the Court of Appeal for East Africa and elsewhere. Mr. Georgiadis has himself put before us two such decisions where the question has been discussed. We have considered both these authorities, which support his submission that the appellate court has a duty to submit the evidence as a whole to a fresh and exhaustive scrutiny as a result of which it may in proper circumstances be warranted in differing from the trial judge, even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen. See *Canisio s/o Walva v. R.* (1956), 23 E.A.C.A. 453 and *D. R. Pandya v. R.*, [1957] E.A. 337. We think, however, the position is put most clearly and helpfully in a later decision of the same court, *Peters v. Sunday Post*, [1958] E.A. 424, where Sir Kenneth O'Connor, P., at p. 429 said:

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage

> of seeing or hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached on that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that an appellate court might itself have come to a different conclusion."

The learned President then went on to quote at some length from the opinions delivered in the House of Lords in the well-known case of *Watt v. Thomas*, [1947] A.C. 484.

Turning now to the present case, we concede at once that, if we were to form an opinion merely on the written record of the evidence, we should not have been inclined to put our assessment of the credit-worthiness of the police witnesses quite so high as it has been put by the magistrate. In particular, we think that there were features in the evidence of Sgt. Oyoo which appear to justify the criticism of Mr. Georgiadis that he was a witness with a tendency to embroider his evidence. The points we have in mind are those in which he went beyond the evidence of Inspector Nyengenyi in suggesting that some attempt was made by the police to stop people entering the shop and that the second appellant was warned not to hold the meeting. These were not matters of primary importance, and we do not find as much substance in the criticisms by Mr. Georgiadis of the Inspector or the police constable. No doubt it can be said that none of the police witnesses were perfect; a perfect witness is rarely met, and any witness, however honest, may be made to appear uncomfortable under relentless cross-examination. The way in which a witness stands up to cross-examination is something which does not always appear clearly from the record and is a matter in which the trial judge has a more than ordinary advantage over the appellate court in having observed the demeanour of the witness. The magistrate saw and heard the prosecution witnesses and saw and heard the appellants when they gave their evidence. It has not been shown that he misdirected himself in any way in his approach to the evidence or that he overlooked any matters which he ought to have taken into consideration. He formed a clear and definite view on the veracity of the witnesses, and in our view there are no grounds on which we could properly substitute our own views as to which evidence he should have accepted and which rejected.

If the evidence as to the number of people present at and around the shop were material we might have been entitled to form our own view whether it had been clearly established that at least fifty people were present, as this would depend on opportunities of counting and accuracy of estimation. But as we have already said, we do not regard this as a material issue. The other matter of substance on which there is conflict between the prosecution and the defence related to the contents of the speeches made by the appellants. The learned magistrate's conclusions on this point were as follows:

> "The talk by both accused at the meeting was clearly not the type one would expect at a meeting of officials. The first accused made reference to free education, free medical treatment and he said he had been beaten at Thika in the presence of policemen. Those in my view are the utterances of a seasoned political campaigner to a considerable number of persons, with the express intention of seeking a special type of support. Likewise the remarks by the second accused that the persons there assembled should vote for K.P.U. candidates at the forthcoming local elections were intended for a sizeable gathering and not a mere sub-branch committee meeting of fourteen."

In our opinion there was ample evidence on which the learned magistrate could find that this was in fact a true account of the appellant's speeches, and if so, that the purpose of the meeting was political. We do not overlook that the

appellants in sworn evidence denied that they had made the remarks attributed to them. We have not mentioned it because there is no complaint that the magistrate failed to take the defence adequately into consideration; indeed he especially mentioned as a paramount consideration that each of the appellants had given sworn evidence, but he went on to say: "I yet am satisfied beyond doubt that the version of the prosecution is true and that of each accused false."

We turn now from the facts to the law. In s. 2 "meeting" is defined as meaning "any gathering or assembly of persons convened or held for any purposes which include any political purpose". There follow certain exclusions which are not altogether easy to understand but which we do not take to be relied on by the appellants. Subject to the determination of the question whether there was a political purpose, we do not understand that it is denied that there was a "meeting" within the meaning of the definition. There is, it is true a suggestion by Mr. Georgiadis that the occasion was a social gathering, but it was not strongly pressed, and we are in any case unable to accept it.

> "Public gathering" is defined as "a public meeting, a public procession, and any other meeting, gathering or concourse of ten or more persons".

We next come to the two definitions which are of paramount importance for the purposes of this appeal:

> " 'public meeting' means any meeting held or to be held in a public place, and any meeting which the public or any section of the public or more than fifty persons are or are to be permitted to attend whether on payment or otherwise."
>
> " 'public place' means any place to which for the time being the public or any section of the public are entitled or permitted to have access whether on payment or otherwise, and, in relation to any meeting to be held in the future, includes any place which will, on the occasion and for the purposes of such meeting, be a public place."

Before analysing these definitions it will be convenient first to set out the provision under which the charges were laid. Section 5 is in Part III of the Act which is headed "Public Gatherings" and has as marginal note the words "Control of public gatherings". It is a long section with eleven subsections and the charges are laid under the last subsection which, so far as material reads:

> "(11) Any –
>
> (*a*) public meeting . . . which takes place without a licence under this section . . .
>
> shall be deemed to be an unlawful assembly, and –
>
> (i) every person who takes or continues to take part in any such unlawful assembly shall be guilty of an offence; and
>
> (ii) every person who holds, convenes, organizes, forms or collects, or assists or is concerned in the holding, convening, organizing, forming or collecting of, any public gathering such as is referred to in paragraph (*a*) of this subsection . . . shall be guilty of an offence and liable to imprisonment for a term not exceeding three years."

The charge on which the appellants were convicted alleged that they "held" a public meeting which took place without a licence contrary to paragraph (ii) of the subsection, and the alternative charge on which in his Petition of Appeal Mr. Georgiadis submits they should have been convicted alleges that they took part in an unlawful assembly, contrary to paragraph (i). The alternative charge

was, of course, the less serious of the two and under s. 17 is subject to a general penalty of a fine not exceeding Shs. 5,000/- or imprisonment for a term not exceeding six months.

Before the appellants could be found guilty on either charge, it was necessary first to establish that there was a public meeting, and we must now look at the definition of "public meeting". It seems to us clear as crystal that the definition is a double one, and contains two descriptions, each of which by itself is sufficient to constitute a public meeting. The first is "any meeting held or to be held in a public place"; the second is "any meeting which the public or a section of the public or more than fifty persons are or are to be permitted to attend whether on payment or otherwise". It is true that one would have expected the word "or" instead of "and" between the two limbs of the definition, but we note that in the previous definition of "public gathering" the draftsman also uses "and" where "or" would be more appropriate. We concede, too, that there appears to be a considerable amount of duplication and overlapping in this group of definitions. For example, in the definition of "public gathering", it is difficult to give any meaning to the expression "any other meeting . . . in any public place", seeing that (if we are right) any meeting held in a public place is a public meeting. Similarly, it would appear that in the definition of "public meeting" the words "any meeting which the public or any section of the public . . . are or are to be permitted to attend whether on payment or otherwise" are surplusage, since the place of such a meeting would under the ensuing definition be a public place and the meeting would accordingly be a public meeting. We do not think that any construction of the definition is capable of removing all these superfluities. But whether this is so or not, we still do not consider that there is any other possible construction of the definition of "public meeting" than the one that we have propounded. If it had been intended as a single definition not only would there have been no comma after the words "public place", but the words "any meeting" which occur in the second line must, in our considered view, have been omitted, and the definition would have read:

> " 'public meeting' means any meeting held or to be held in a public place *and which* the public", etc.

There is, if we are right, no requirement that in order to constitute a public meeting there must be more than fifty persons present. It is this misunderstanding (if such it is) which seems to us to have distorted the proceedings by causing lengthy evidence to be adduced as to the number of people present, evidence in turn subjected to lengthy cross-examination, lengthy argument as to the trustworthiness of the estimates put forward, and lengthy consideration in the judgment of the question whether it had been established that more than fifty people were present.

In our view all that was necessary in order to establish that the meeting was a public meeting was to show that the place where it was held was a public place, and this was clearly established beyond argument by showing that it was held in a shop, that the doors of the shop were wide open, and that there were no guards of any kind controlling access. We have already discussed the political purpose of the meeting and we are satisfied that it was a public meeting within the definition.

We come now to the most substantial ground of appeal which is set out as follows in paragraph 3 of the Petition:

> "The Learned Magistrate erred in Law when he omitted to direct his mind at all to the aspect of 'holding' a public meeting in relation to each Appellant under section 5 (11) (ii) of the Public Order Act, which was a necessary ingredient of the charge before he could find either Appellant

> guilty on the first count, and further had he done so, he would have inevitably concluded that there was insufficient evidence to support that either Appellant 'held' such a meeting."

The only reference to this point in the judgment is where the magistrate says:

> "I have to determine if the accused persons held a public meeting which took place without a licence issued by the District Commissioner under section 5 of the material Act."

He nowhere considered the meaning of the word "held" although argument was addressed to him on the point from both sides.

It may be observed that paragraphs (i) and (ii) in subsection (11) of section 5 define what has been described as the passive and the active aspects of attendance at a public meeting. Under paragraph (i) mere presence is probably sufficient to constitute an offence. Under paragraph (ii) the primary offence is committed by a person who "holds, convenes, organizes, forms or collects" (*inter alia*) a public meeting. It is submitted that the last four words suggest forethought and planning, and that on the principle "noscitur a sociis" (which means that words, like people, are known by the company they keep), a similar connotation should be implied in the word "hold". Mr. Hobbs for the Republic does not concede that the words "form" and "collect" have any such significance, but the words are used transitively and we are inclined to side on that point with Mr. Georgiadis. Mr. Hobbs further points out that "hold" is a word of very general significance and is not a term of art, and that it should not be construed narrowly in this context.

We have not found this an easy question to decide. Many instances have been canvassed. At the one extreme, the speaker who mounts on a soap-box at Hyde Park Corner undoubtedly holds a meeting – if, that is, he is fortunate enough to gain an audience. At the other extreme, the principal speaker at a political meeting, however distinguished a figure he may be, probably does not "hold" a meeting when he rises to speak on the invitation of the chairman flanked by committee members on the platform. In the first case there is no one other than the speaker responsible for collecting the audience; in the other the meeting has ordinarily been convened and advertised by persons other than the speaker. We have to ask ourselves on which side of the line the occasion under consideration lies, and we must consider all the surrounding circumstances. Here we have the sub-branch of a party set up in what we take to be a comparatively small trading centre. An office is to be opened, and it is learned that the Vice-President of the party is staying on a visit about ten miles away. We note at the outset a marked disparity between the humble stature of the committee members and the distinction within the party of the principal guest. The chairman of the sub-branch asked Mr. Ochok to invite Mr. Kaggia to pay a courtesy call on the proposed sub-branch. Mr. Kaggia agreed. All this, according to the evidence of the appellants took place on the morning of February 17, the day of the meeting. The officials and committee members of the sub-branch no doubt had been informed of what was proposed, and were waiting to receive Mr. Kaggia. In fact it is in evidence that Mr. Kaggia told Mr. Ochok to tell the officials to be there between 11 a.m. and noon. Although the proposal for the meeting may have come from the sub-branch in the first place, there was at any rate some small degree of preparation on the part of Mr. Kaggia and Mr. Ochok, and probably there would have been no meeting if Mr. Kaggia had not agreed to be present. Whether that is so or not, what clearly emerges from the evidence is that when Mr. Kaggia and his party arrived it was he and Mr. Ochok who took charge of the proceedings, and it was they who decided when the meeting should end and the audience should disperse.

It would in our opinion be wholly unrealistic to decide that in these circumstances the appellants did not "hold" the meeting. "Hold" is in its nature one of the most general words in the English language, and it would require strong argument to show that in this context it is not wide enough to cover the activities of the appellants. The "ejusdem generis" principle is not of universal application, and moreover there is an indication in the immediate context of what is intended by the word "hold". In the sixth line of paragraph (ii) in relation to public gatherings referred to in paragraph (*b*), the words "hold or conduct" appear in juxtaposition, and the maxim "noscitur a sociis" may just as readily be applied in the one place as in the other. If there is no significant difference in the meaning of the terms "hold" and "conduct" in this context, and "hold" is to be given the same meaning in both places, it is scarcely any longer open to argument that "hold" in relation to a meeting such as is referred to in paragraph (*a*) necessarily presupposes some degree of previous planning.

For the above reasons we are satisfied that the convictions were proper and we confirm them. We proceed now to consider the appeals against sentence.

The offence of which the appellants were convicted carries a maximum sentence of three years' imprisonment. There is no mention of any fine, from which it may be gathered that Parliament did not intend that in ordinary cases a fine should be considered appropriate punishment. The magistrate had nothing to guide him, since offences under this Act have seldom been before the courts, and he chose to impose a sentence of imprisonment for one-third of the maximum term. This is a convenient rule of practice frequently applied in the courts and in most cases the result is not unreasonable. State Counsel has conceded that the sentences were severe, but nevertheless has urged the court not to interfere with them. Mr. Georgiadis submits that they are manifestly excessive and should not be allowed to stand.

Before imposing sentence the magistrate said: "I cannot overlook the deliberate and defiant disregard for the law." The appellants must be taken to have known that (in general terms) a licence is required for a political meeting and to have realised that the meeting which was being held was a public meeting and contrary to law; to that extent there is some substance in the magistrate's comment. But we have no reason to think that before their arrival at Muriu Market either of the appellants knew that the meeting was to be held in a shop open to the public, and so far as the evidence goes they may well have set out from Kendu Bay with nothing else in mind than to hold a private ceremony to mark the opening of the sub-branch office as they claim to have done on many occasions before. We do not think that it has been shown that there was any premeditated defiance of the law. But when the party arrived at Muriu Market the position was different. A receptive audience is meat and drink to a politician and it is clear that Mr. Kaggia, abetted by Mr. Ochok, succumbed to the temptation offered to them on the spur of the moment and took advantage of the opportunity to harangue a sizeable crowd. The absence of premeditation is in our view a mitigating factor and another is the absence of any disorderly conduct or incitement to violence and the fact that the meeting was terminated promptly at the bidding of the police. Nor would it be right to disregard the fact that the police were openly present throughout and until the last moment made no attempt to interfere with the proceedings. We do not criticise the police for their conduct: we are merely concerned with the effect on the minds of the appellants of their presence and apparent acquiescence in what was going forward. Finally, we note that the penalty of three years' imprisonment is prescribed for a number of offences under the paragraph, not all of which are of equal gravity. One is to continue to hold or conduct a public gathering after three or more persons have refused to obey an order issued by the police under

sub-s. (1) of s. 5. That might well be described as deliberate defiance, as also might the case of a person who having applied for a licence for a public meeting and had it refused, nevertheless proceeded to hold the meeting.

In the light of these considerations, we think that the magistrate overstated the case against the appellants in referring to "a deliberate and defiant disregard for the law". But when all that can properly be said in favour of the appellants has been taken into account, a substantial offence remains, which the magistrate was quite right to punish by imprisonment. It is idle for Parliament to enact legislation of this character unless it is going to be strictly enforced by the courts. We are satisfied that the sentence actually imposed was over-severe; but we should merely err in the other direction if we were to substitute a sentence which could be regarded as merely nominal. Our order is that for the sentence of twelve months' imprisonment imposed by the magistrate there shall be substituted in respect of each of the appellants a sentence of six months' imprisonment. To this limited extent the appeals are allowed.

Appeals against conviction dismissed. Sentences reduced.

For the appellants:
B Georgiadis
B Georgiadis, Nairobi

For the respondent:
JR Hobbs (Deputy Public Prosecutor)
Attorney-General, Kenya

Jethwa and another v Republic
[1969] 1 EA 459 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	3 April 1969
Case Number:	13/1969 (68/69)
Before:	Sir Charles Newbold P, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya at Nairobi – Mwendwa, C.J., and Wicks, J

[1] Criminal Law – Stolen goods – "Recent possession" – Whether person in possession must know or have cause to believe goods stolen before doctrine can apply.

[2] Criminal Practice and Procedure – No case to answer – Submission of no case to answer based on allegation that principal prosecution witness an accomplice – When ruling on this point to be made.

[3] Evidence – Accomplice – Conviction of theft obtained principally on evidence of purchaser of stolen

goods – Whether that witness an accomplice.

Editor's Summary

The two appellants were convicted by a Nairobi Resident Magistrate of having stolen a tape recorder player. The only witness incriminating them was the person to whom they had sold the player, and there were no witnesses to that sale. In the magistrate's court it was submitted that on the evidence there was no case to answer but the magistrate rejected this submission and found the appellants guilty. The convictions were upheld by the High Court. Appeal was then made to the Court of Appeal on the grounds (*a*) that the magistrate and the High Court had misdirected themselves in not holding the principal prosecution witness to be an accomplice; and (*b*) that the High Court had misdirected itself on the evidence.

Held –

(i) Whether a witness is an accomplice is a question of fact for the magistrate to decide after considering all the evidence before him (*Githae v. R.* (2) followed);

(ii) the magistrate acted correctly in overruling the submission of "no case to answer" and reserving his ruling on whether the witness was an accomplice;

(iii) the magistrate was on the evidence fully justified in his decision.

Obiter –

(i) the doctrine of recent possession which is a presumption of fact only arises when the court sitting as a jury believes that a person in possession of the goods knew or had reason to believe them to have been stolen or otherwise feloniously obtained;

(ii) if a magistrate is unable to decide whether a witness is an accomplice he should resolve that doubt in favour of the accused.

Appeal dismissed.

Cases referred to in judgment:

(1) *Davies v. Director of Public Prosecution*, [1954] 1 All E.R. 507.

(2) *Githae v. R.* (1956), 23 E.A.C.A. 440.

(3) *Jennings v. R.* (1912), 7 Cr. App. R. 242.

(4) *Dixon v. R.* (1925), 19 Cr. App. R. 36.

(5) *Uganda v. Shah*, [1966] E.A. 30.

Judgment

The following considered judgment of the Court was read by **Duffus JA:** This is a second appeal from the appellants' convictions by a Resident Magistrate sitting in Nairobi on a charge of theft from a motor vehicle contrary to s. 279 (*g*) of the Penal Code. The appellants' first appeal was heard and dismissed by the High Court. The second appeal to this Court only lies on a point of law.

There are five grounds of appeal but these may be considered under two heads, that is: (*a*) that the trial magistrate and the learned judges on the first appeal misdirected themselves in not holding that the principal and, indeed, only witness incriminating the appellants, a Mr. Saleh Mohamed Ahashan, was an accomplice; (*b*) that the learned judges on the first appeal misdirected themselves on the evidence.

The facts as found by the trial magistrate can be shortly stated. The complainant, a Mr. V. P. Mandal, purchased a cassette tape recorder player from a firm in Nairobi known as Minni Cine Films for Shs. 1,500/- on March 1, 1968, and he fitted this instrument in his motor-car. Three days after, on March 4, 1968, the window of his motor-car was forced and the cassette player stolen.

On March 7, 1968, at about 9 p.m. the two appellants sold the cassette player to the witness, Saleh Mohamed Ahashan, for Shs. 500/- at the Lidos Bar, Nairobi, the place where the witness carried on his business of roasting meat. The witness stated that he knew both appellants before and that they were his

customers. There were no witnesses to the sale. On the following day, March 8, the witness Ahashan took the cassette player to the same shop, Minni Cine Films, to enquire for a spare part. There the manager of the shop recognized the cassette player as the one sold to and subsequently stolen from the complainant and he so informed the witness Ahashan. Ahashan then left the player at the shop and immediately went and reported the matter to the police. Police constable Kinuba went with the complainant to the shop and collected the stolen cassette player and the witness Ahashan then took the constable to a house where he pointed out the second accused who was then arrested. According to

the witness Ahashan, they also went to the first appellant's house but did not find him. We must comment here that there are certain peculiar and unexplained gaps in the investigation of this case. The second appellant was apparently arrested on March 8, but then released and was rearrested over three months later when the first appellant was arrested on June 29. No explanation has been given why the second appellant was first released or why there was a delay of over three months in arresting the first appellant, and then rearresting the second appellant. No attempt was made by either the prosecution or the defence to ascertain whether the second appellant said anything when he was pointed out by the complainant on the same day that the cassette player was traced, nor was there any evidence given as to any explanation or denial having been made by either of the appellants. At the close of the prosecution's case the appellants by their advocates submitted that the prosecution had not established a *prima facie* case against either of the appellants as the only evidence connecting the appellants with the crime was that of the witness Ahashan whom they submitted was an accomplice and unworthy of belief. The Resident Magistrate rejected these submissions and held that a *prima facie* case sufficient to require each appellant to make a defence had been made out, and he acted in accordance with s. 211 (1) of the Criminal Procedure Code. Both the appellants elected to say nothing and to call no witnesses.

In a reserved and carefully considered judgment the Resident Magistrate found that the witness Ahashan was not an accomplice, and went on to say:

> "I have had the opportunity of studying the demeanour and hearing of [Ahashan] while he was giving his evidence. He impressed me as a simple straight forward and an honest witness; I have no doubt whatsoever in my mind that he has told the truth. I have therefore no hesitation in accepting his evidence as being true."

He accepted the prosecution's case and found that the appellants had been in possession of the stolen cassette player some three days after the theft, and applying the doctrine of recent possession found both appellants guilty of theft as charged. On the appeal to the High Court the learned judges, in a considered judgment, upheld the convictions and dismissed the appeal.

We will first consider the question as to whether the witness Ahashan was an accomplice. This Court has accepted the definition of an accomplice as that laid down by the House of Lords' decision in *Davies v. Director of Public Prosecutions*, [1954] 1 All E.R. 507, [H.L.]. In the case of *Githae v. R.* (1956), 23 E.A.C.A. 440, at p. 441, this Court said:

> "The rule of law has been put beyond doubt by the unanimous opinion of their Lordships in *Davies v. Director of Public Prosecutions*, [1954] 1 All E.R. 507, [H.L.], at p. 514, where it was said that the definition of the term accomplice 'covers participes criminis in respect of the actual crime charged, whether as principals or as accessories before or after the fact'. That statement of the law must be regarded as binding on this Court with the result that previous decisions to the contrary are no longer the law."

The judgment in the *Davies* case then went on to include receivers of stolen goods as being an accomplice of the thieves from whom they received the goods on the trial of the thieves for theft and in this respect reference was made to the cases of *Jennings v. R.* (1912), 7 Cr. App. R. 242, and *Dixon v. R.* (1925), 19 Cr. App. R. 242.

It is therefore clear that the witness Ahashan would be an accomplice if he was a receiver of the cassette player. A receiver is defined by s. 322 of the Penal Code as being a person who receives or retains any chattel knowing or having

reason to believe the same to have been feloniously stolen, taken, extorted, or obtained, but the question is how does the court decide whether a witness is a receiver or a person in innocent possession of goods? This question was fully considered in the *Davies* case and the following extract from a judgment of Lord Simonds, L.C., in that case is a useful guide to trial courts:

> "But, it may reasonably be asked, who is to decide, or how is it to be decided, whether a particular witness was a 'particeps criminis' in the case in hand? In many or most cases this question answers itself, or, to be more exact, it is answered by the witness in question himself, by confessing to participation, by pleading guilty to it, or by being convicted of it. But it is indisputable that there are witnesses outside these straightforward categories, in respect of whom the answer has to be sought elsewhere. The witness concerned may never have confessed, or may never have been arraigned or put on trial, in respect of the crime involved. Such cases fall into two classes. In the first, the judge can properly rule that there is no evidence that the witness was what I will, for short, call a participant. The present case, in my view, happens to fall within this class, and can be decided on that narrow ground. But there are other cases within this field in which there is evidence on which a reasonable jury could find that a witness was a 'participant'. In such a case the issue of 'accomplice vel non' is for the jury's decision: and a judge should direct them that, if they consider on the evidence that the witness was an accomplice, it is dangerous for them to act on his evidence unless corroborated: though it is competent for them to do so if, after that warning, they still think fit to do so."

In Kenya the Resident Magistrate, as also a judge of the High Court, sits as both judge and jury, and in this case it was for the Resident Magistrate, after correctly directing himself on the law, to decide whether as a fact the witness Ahashan should be treated as an accomplice or not. It is therefore largely a question of fact as to whether the Resident Magistrate finds a witness to be an accomplice or not. This decision is one that should be taken at the conclusion of the case when the magistrate is considering his decision and evaluating all the evidence in the case and we would in this respect refer to the following short extract from the judgment of this Court in *Uganda v. Shah*, [1966] E.A. 30, at p. 31, delivered by Spry, J.A.:

> "Of course, quite apart from any question of corroboration, a court should never accept or reject the testimony of any witness or indeed any piece of evidence until it has heard and evaluated all the evidence in the case. At the conclusion of a case, the court weighs all the evidence and decides what to accept and what to reject."

The learned Resident Magistrate appears to have acted correctly in this matter in that when the defence submitted that the witness Ahashan was an accomplice and that a *prima facie* case had not been made out, he then made no ruling as to whether Ahashan was an accomplice, but he overruled the submission of "no case" and called for the defence. It was open to the defence at this stage to have called evidence to show that the witness was in fact an accomplice, evidence which the magistrate would have considered in arriving at his decision. As it happened, the defence called no evidence at all and it was only in his considered judgment that the magistrate found that the witness was not a receiver but was a person in innocent possession of the cassette player. This finding is, as we have pointed out, really a finding of fact, but Mr. Kapila for the appellants has endeavoured to attack this finding on questions of law in various respects. He submitted that the trial court and the first appeal court did not consider the doctrine of "recent possession" as it applied to the witness Ahashan. The doctrine of recent possession is a presumption of fact arising under

s. 119 of the Evidence Act from the recent possession of stolen goods; but this is a presumption that only arises when the court sitting as a jury believes that the person in possession of the goods knew or had reason to believe that the article received was stolen or otherwise feloniously obtained. This is a question of fact and the magistrate could only arrive at his conclusion after considering all the evidence before him and then deciding whether the witness was an accomplice or not and this is exactly what the magistrate appears to have done in this case.

Mr. Kapila also raised the question of value in that the cost of the cassette player was given as Shs. 1,500/- but the witness Ahashan only paid Shs. 500/- but, as the High Court points out in their judgment, no suggestion was made to the witness Ahashan that he had bought this machine at an under-value. Here again is a question of fact.

Mr. Kapila also made the point that the magistrate's finding that the witness Ahashan was not an accomplice was based largely on the evidence of the witness Ahashan himself but this would in some cases appear inevitable and is part of the heavy responsibility that a trial magistrate or judge has to bear when he sits alone without a jury. In arriving at his decision the trial magistrate must consider all the circumstances of the case and decide whether the witness was speaking the truth.

Mr. Kapila did not proceed with the question as to whether the magistrate had directed himself fully on the onus of proof, but we agree with Mr. Kapila that if in circumstances such as in this case the magistrate is unable to decide whether a witness is an accomplice or not, he should resolve that doubt in favour of the accused and regard the witness as an accomplice and act accordingly. This Court also raised the question, and fully considered whether in the circumstances of this case the trial court even though satisfied that the witness Ahashan was not an accomplice had given the matter that full consideration required in a criminal case before arriving at a verdict of guilty. The particular circumstances in this case are that the case against the appellants depended entirely on the testimony of the witness Ahashan who had in fact been in possession of the stolen cassette player.

The Resident Magistrate gave a considered judgment in which he fully dealt with all the evidence before the court. Apart from the evidence of the witness Ahashan, there were the facts that Ahashan had publicly taken the cassette player to a shop in Government Road dealing with such goods to enquire as to spare parts for the player, and on discovering that it was stolen immediately went to the police station and made a report and returned with a constable to recover the player and then took the constable to search for both appellants and actually found and pointed out the second appellant. His evidence remained uncontradicted and the magistrate believed him to be "a simple, straightforward and honest witness", and in our view was justified in coming to the conclusion that the witness's possession of the cassette player was an innocent one and that he was not an accomplice.

Having arrived at that conclusion the Resident Magistrate did not have to treat the witness Ahashan as an accomplice and look for corroboration, and he also appears to have fully considered all the other relevant considerations apart from the question as to whether the witness was an accomplice. He reminded himself that the case against the appellants rested solely on the evidence of the witness Ahashan and he dealt with the various submissions made by the defence as to the reliability of his evidence. We agree with the learned judges of the High Court sitting on the appeal that the Resident Magistrate was on the evidence fully justified in his decision.

We can find no real merit on the grounds of appeal relating to the learned

judges of the High Court having misdirected themselves. We would therefore dismiss this appeal, and it is so ordered.

Appeal dismissed.

For the appellants:
AR Kapila, R Shah and *BJ Sarvaiya*
AR Kapila & Co, Nairobi

For the respondent:
JB Karugu (Senior State Counsel, Kenya)
Attorney-General, Kenya

Withers-Payne v Commissioner of Income Tax
[1969] 1 EA 464 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	3 April 1969
Case Number:	55/1968 (69/69)
Before:	Sir Charles Newbold P, Duffus and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanzania – Platt, J

[1] Income Tax – Deductions – Development levy – Not deductible – East African Income Tax (*Management*) *Act* 1958, *ss.* 14 *and* 15.

[2] Income Tax – Development levy – Whether deductible from salary.

Editor's Summary

The amount of development levy deducted by an employer under the Development Levy Act of Tanzania is not deductible by the employee from his salary for income tax purposes.

Appeal dismissed. No order as to costs.

Cases referred to in judgment:

(1) *A.L. et al. v. Commissioner of Income Tax* (1957), 2 E.A.T.C. 148.

April 3, 1969. The following considered judgments were read:

Judgment

Sir Charles Newbold P: The appellant was assessed to income tax for the years of income 1965 and 1966. He appealed to the High Court against the assessments and his appeal was dismissed. He now appeals to this Court against the decision of the High Court.

The facts are not in dispute and the issue in respect of both assessments is precisely the same and falls within a very narrow ambit. For each year the salary of the appellant from his employer was £1,740 and for each year from this salary his employer deducted the amount of the development levy for which the defendant was liable under the Development Levy Act 1965 before paying the appellant any salary. The issue is a simple one: is the income of the appellant for the purposes of the determination of the income tax payable by him the amount of his salary or the amount of his salary less the development levy? The trial judge held that it was the amount of his salary and I have no doubt whatsoever that he was right.

The appellant, who argued his appeal most attractively and skilfully, submitted that as he never received the amount of £1,740, but only that amount less the

development levy, his chargeable income was not £1,740 and to regard it as such would have the effect that he would be paying income tax on an amount paid for development levy and which he had never received. The appellant stressed the well-known phrase of Rowlatt, J., that "receivability without receipt is nothing". Broadly this may be correct, but there are circumstances in which the phrase is not correct. Assuming it to apply to the circumstances of this case, the question nevertheless arises as to what is receipt. It is clear that a person may in law receive income without physically receiving it. The appellant accepted this to be correct – indeed he could not do otherwise – but submitted this was only so where his employer had paid with the appellant's consent a part of his salary to a creditor or had utilised it otherwise for the appellant's benefit. The appellant urged, however, that the development levy was not deducted from his salary with his consent, but by force of the law, and that the amount which was deducted was not utilised for his benefit as no part of it ultimately came back to him or to his estate.

Section 5 of the Development Levy Act charges a levy on the income of specified persons, of whom the appellant is one, and s. 6 provides the machinery for its collection by means of a deduction made by the employer from the income. It is obvious that anyone taking employment in Tanzania who is liable to pay this development levy knows this position will arise; and by virtue of his taking employment he has impliedly consented to the deduction. I am not sure that I accept the appellant's submission that a person would only receive in law an amount deducted with his consent from his salary where the deduction of that amount benefits him or his estate. For example, I consider that the appellant would have received in law an amount deducted from his salary and paid by his direction to a charity.

In any event, the development levy, being part of the revenue of the country in which the appellant is living and whose protection and amenities he enjoys, ultimately enures for his benefit in the form of such protection and amenities.

I am satisfied that the amount of the development levy deducted by his employer from his salary is nonetheless part of the income of the appellant which he has received and which is chargeable to income tax. I am unable to see for this purpose any distinction between the payment by the employer on behalf of the appellant of the development levy and any payment made by the employer at the request of the appellant to satisfy any other debt of the appellant. In each case it is a payment out of the income of the appellant which is regarded as having been received; and unless such payment is deductible under the income tax law, which the payment was not, the income is chargeable to income tax.

For these reasons I would dismiss the appeal. As both the other members of the Court agree it is so ordered. By agreement between the parties, no order for costs will be made.

Law JA: I agree with the judgment prepared by the President, Sir Charles Newbold, and will only add a few words.

It is, of course, quite wrong in principle that part of a taxpayer's income, which is deducted at source in the form of a government levy before it reaches his hands, should be subject to income tax. I have much sympathy with the appellant's argument that such a levy does not form part of his income, as it was never received by him. But as Sir Ronald Sinclair, V.-P. (as he then was) remarked in *A.L. et al. v. Commissioner of Income Tax* (1957), 2 E.A.T.C. 148, "the law of income tax is such that it is useless to try to relate it to any standards of natural justice". The statutes enacted for the imposition and collection of income tax must be strictly construed. Receivability is not the only test of liability to tax in East Africa; income is taxable if it accrues in, derives from or

is received in East Africa. In the case of a salaried person with no other source of income in East Africa, such as the appellant, his income is his gross salary, less such deductions as the law allows. The relevant statutory provision as to allowable deductions is s. 14 of the East African Income Tax (Management) Act 1958, read together with s. 15. Nothing in s. 14 of the Act allows the deduction of development levy for the purpose of ascertaining the total income of a taxpayer, and s. 15 (2) (*c*) of the Act is specific in stating that no deduction shall be allowed in respect of any income tax or tax of a similar nature paid on income, subject to exceptions which are immaterial for the determination of this appeal. The development levy, being a deduction from income, is clearly a tax of a similar nature to income tax. Another example of a tax of a similar nature to income tax is graduated personal tax in Kenya, which under the Graduated Personal Tax Act (Cap. 470, Revised Laws of Kenya) is payable in respect of income, and which by s. 8 of that Act must be deducted at source, in the case of an employed person, by his employer, in the same way as development levy is deducted in Tanzania. Amounts so deducted in respect of graduated personal tax are not deductible from income in ascertaining the employee's total income for income tax purposes, although these amounts are never actually received by the employee. They remain part of his gross salary, and therefore of his total income. The appellant has been unable to point to any statutory provision entitling him to deduct development levy in the assessment of his income for income tax purposes, and I have reluctantly also come to the conclusion that this appeal must fail, and the assessments the subject of this appeal be confirmed.

Duffus JA: I agree with the judgment of my lord President.

Appeal dismissed.

Appellant in person.

For the respondent:
JM Khaminwa (Principal Assistant Legal Secretary, E.A.C.S.O.)
The Counsel to the East African Community, Nairobi

Patel v Gulamhussein Brothers
[1969] 1 EA 467 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	12 April 1969
Case Number:	56/1968 (70/69)
Before:	Sir Charles Newbold P, Duffus and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanzania – Hamlyn, J

[1] Civil Practice and Procedure – Evidence – Oral evidence – Discretion to allow oral evidence –

Whether properly exercised – Civil Procedure Code 1966, *O.* 18, *r.* 4 (*T.*).

[2] Evidence – Admission – Proof to court's satisfaction – Whether court may act on admission of defendant.

[3] Rent restriction – Possession – Vacant possession – Application to vary order for vacant possession before execution of order – Whether jurisdiction to vary – Rent Restriction Act 1962, *s.* 19 (5) (*T.*).

[4] Rent restriction – Possession – Vacant possession – Evidence on which Tribunal can make order for possession – Rent Restriction Act 1962, *s.* 19 (*T.*).

[5] Rent restriction – Possession – Vacant possession – Whether order can be made by consent – Rent Restriction Act 1962, *s.* 19 (*T.*).

Editor's Summary

The appellant had been the tenant of premises subject to the Rent Restriction Act of which the respondents were the landlords. In July 1966 an order was made in the Rent Restriction Board giving the respondent vacant possession of the premises in December 1966. The order was expressed to have been made by consent. Thereafter, and before vacant possession was in fact given to the respondents, the Act was amended by the Rent Restriction (Amd.) (No. 2) Act No. 57 of 1966, which gave wide powers to the Resident Magistrate's Court to deal with applications arising out of orders for possession previously made by the Rent Restriction Board. The appellant remained in possession, and in November 1967 applied to the Resident Magistrate's Court to discharge stay or postpone execution of the order of July 1966. An affidavit in support and one in reply were filed. The grounds of the application were that there had been a new tenancy agreement and that the consent order was a nullity. The magistrate held that the consent order was competent and could not be varied otherwise than by consent.

After appealing unsuccessfully to the High Court, the appellant appealed to the Court of Appeal on the grounds that the consent order was null and void and that the magistrate had denied to the appellant the opportunity to present further evidence in support of his application.

Held –

(i) an order for possession of premises under s. 19, Rent Restriction Act can only be made when the court is satisfied that the requirements provided by the section exist;

(ii) a consent order under s. 19 cannot therefore be made; but if a tenant admits that the requirements provided by the section do exist, the court may accept this as sufficient proof, and if it is satisfied that it is reasonable to do so, make the order asked for (*Middleton v. Baldock* (5) adopted);

(iii) the magistrate had power to vary the original order for possession, since it had not been executed (*Rossiter v. Langley* (3) adopted);

(iv) the magistrate had power to direct the manner in which the issue before him should be decided, and had power to direct that oral evidence be taken;

(v) the magistrate properly exercised his discretion not to allow oral evidence.

Appeal dismissed.

Cases referred to in judgment:

(1) *Wellesley v. White*, [1921] 2 K.B. 204.

(2) *Barton v. Fincham*, [1921] 2 K.B. 291.

(3) *Rossiter v. Langley*, [1925] 1 K.B. 741.

(4) *Thorne v. Smith*, [1947] K.B. 307.

(5) *Middleton v. Baldock*, [1950] 1 K.B. 657.

(6) *Karim v. Ahmed* (1953), 20 E.A.C.A. 63.

April 12, 1969. The following considered judgments were read:

Judgment

Duffus JA: This is an appeal from the decision of the High Court in proceedings under the Rent Restriction Act (Cap. 479). These proceedings started in 1965 with an application to the Rent Restriction Board for possession of premises. The record of appeal does not contain particulars of this application nor does it contain a copy of the proceedings before the board, but the application resulted in the following order being made on July 6, 1966:

> "ORDER
>
> *By consent*
>
> 1. Vacant possession of suit premises to be delivered by respondent to applicant on or before 31st December, 1966.
> 2. Respondent to pay to applicant mesne profits and sewerage charges from 1st May, 1965 onwards.
> 3. Respondent to pay to applicant costs including Board fees Shs. 300/ – ."

The Rent Restriction Act was considerably amended by the Rent Restriction (Amendment) (No. 2) Act, No. 57 of 1966, and the Rent Restriction Board was abolished and instead the Rent Tribunal established, and the powers of the Resident Magistrate's Court to deal with matters under the Act were greatly enlarged. In particular claims for the recovery of possession were now dealt with by the Resident Magistrate and this included jurisdiction to deal with application arising out of an order for possession previously made by the Rent Restriction Board. The application now before the court is an application by the tenant, the appellant in this appeal, for the court to discharge, stay, or postpone execution of the order of July 6, 1966, and is made under the provisions of s. 19 (5) of the Rent Restriction Act. The application was supported by an affidavit by the tenant, and the landlord, the respondent in this appeal, also filed a counter-affidavit. The application is dated November 29, 1967; and it is common ground that up to that date the tenant still remained in possession of the premises and had not as required by the consent order of July 6, 1966, given up possession on December 31, 1966.

The application was based on two substantive grounds, being (*a*) that the consent order had been displaced by a new tenancy agreement between the parties whereby the landlord agreed with the tenant that he should remain in occupation of the premises on payment of the standard rent; and (*b*) that the consent order was a nullity.

In the counter-affidavit the landlord denied that there had been a new tenancy agreement and averred that any payments made had been by way of mesne profits in accordance with the consent order of July 6, 1966.

The application came before a Senior Resident Magistrate on December 6, 1967, and eventually, after hearing arguments by the advocates for each party, the Senior Resident Magistrate in a written ruling dated May 18, 1968 dismissed the application. The Resident Magistrate held that the consent order was competent and that the court could not go behind this consent order, and he further held that the order could not be varied in the absence "of a clear and unequivocal consent between the parties".

The matter went on appeal to the High Court and the appeal was dismissed. The judge held *inter alia*:

(1) that the proper method of setting aside the consent order would have been by way of appeal and not by an application of this nature;

(2) that whilst not ruling that a consent order could not be varied by the court called upon to execute it yet at least good cause must be shown by the applicant to justify such variation, and this had not been done in this case;

(3) the judge made no direct ruling on the question of the appellant's application to call further evidence but he appeared to be satisfied that the Resident Magistrate had sufficient evidence on the affidavits to justify his decision and that the appellant had not put forward any facts for the consideration of the Resident Magistrate upon which his application could have been granted.

The learned judge therefore dismissed the appeal but granted leave to appeal to this Court.

There were four grounds of appeal to this Court. The first three grounds were directed to the validity of the consent order and submitted that the Resident Magistrate should have held that the order was null and void. After hearing the appellant's advocate, we did not call upon the respondent's advocate to address us on these three grounds. The fourth ground of appeal was, however, fully argued and this reads as follows:

> "In the further alternative, the learned judge should have allowed the appeal on the ground that the appellant had been denied the opportunity by the Senior Resident Magistrate to present further evidence in support of his application under section 19 (5) of the Rent Restriction Act and/or that the Senior Resident Magistrate should have received other and further evidence in order to try the issues before him fairly and effectively."

Before proceeding to consider this ground I would state my reasons for agreeing with the other members of the court that there was no substance in the first three grounds. There can be no doubt that an order for possession can only be made under s. 19 of the Rent Restriction Act when the court is satisfied (*a*) that one of the 14 grounds set out in s. 19 (1) exists; and (*b*) that, as provided by sub-s. (2) of s. 19, it is reasonable to make an order for possession and further, if possession is sought on any of the grounds specified in paragraphs (*c*), (*e*), (*h*) or (*I*), that unless such an order is made great hardship will be caused to the landlord. These conditions must exist to the satisfaction of the court before an order is made and to this extent it is correct to say that a mere consent order cannot be made. But these prerequisites are largely a matter of proof and in this respect, if the tenant consents, in the sense that he admits that these requirements do exist, then the court may accept his admission as sufficient proof and, if it is satisfied that it is reasonable so to do, may make the order. This legislation is similar to the provisions of the English rent restriction laws and this question has been dealt with by the English courts in various cases. I would refer here to the judgments in the cases of *Barton v. Fincham*, [1921] 2 K.B. 291, *Thorne v. Smith*, [1947] K.B. 307 and in *Middleton v. Baldock*, [1950] 1 K.B. 657.

I think the following extract from Jenkins, L.J., in the *Middleton v. Baldock* case (at page 669), when considering the *Barton v. Fincham* and *Thorne v. Smith* cases is also applicable here:

> "I think that the principles deducible from those cases are these: under the Acts the court only has jurisdiction to order possession on one or other of the specified statutory grounds. It is not, however, always obliged to hear a case out; for, if the tenant appears and admits that the landlord is entitled to possession on one of the statutory grounds, the court may act on that admission and make the appropriate order But in my judgment the court cannot go further than that and exercise general jurisdiction to make a consent order without inquiry or investigation simply because the tenant appears in court and says: 'I consent to an order', or says in the witness box that he does not contest the landlord's right. I think that necessarily follows from the principle that possession can only be ordered on one or other of the statutory grounds and that the tenant cannot waive the statutory protection by agreement."

The position as I see it is that the court may accept the admission by the tenant as proof of the required facts and on these admissions find that it would be reasonable and proper to make the order under s. 19 (2), but in doing so it is advisable that the court should avoid using the word "consent" in the order as the court is not making the order because the tenant consents but because it is satisfied that it is reasonable and proper to make the order as required by s. 19.

I have dealt with this matter as there appears to be some misunderstanding over the procedure in cases of this nature; but in fact this question does not really affect this case, as here the Resident Magistrate, in my view, clearly had no power to set aside the order of the Rent Restriction Board under an application made under s. 19 (5). The correct method of challenging the consent order would have been by way of appeal or perhaps by a separate action but not in an application of this nature. This was pointed out both by the Chief Justice when he dealt with an application to stay execution pending the hearing of this appeal and also by Hamlyn, J., in his judgment. Apart from this fact it is impossible, without having the application and other proceedings before the Rent Restriction Board leading up to the Board's final order, to say whether this order had been properly made or not.

I will now consider the fourth ground. This application is made by virtue of the provisions of s. 19 (5) which state:

> "At the time of the application for the making of any order for the recovery of possession of any premises, or for the ejectment of a tenant therefrom, or, in the case of any such order which has been made, whether before or after the passing of this Act, and not executed, at any subsequent time, the court making or executing the order, as the case may be, may adjourn the application, or stay or suspend execution on any such order, or postpone the date of possession for such period or periods as it thinks fit, and, subject to such conditions (if any) in regard to payment by the tenant of arrears of rent, and otherwise, as the court thinks fit, and, if such conditions are complied with the court may, if it thinks fit, discharge or rescind any such order."

In this case the order for possession had already been made by the former Rent Restriction Board, and the Resident Magistrate's court is the court executing the order and as such can exercise the very wide powers of variation of the original order at any time before that order has been executed.

The powers given under sub-s. (5) are extremely wide and it is obvious that

the intention of the legislature was to allow the court to retain full control over the possession of the premises as between the landlord and tenant until the order for possession had been executed. This jurisdiction to interfere with the previous order for possession would in my view clearly include a case such as the appellant avers existed here and the application was therefore properly brought before the court. The Resident Magistrate had power to direct the manner in which the issue before him should be decided. I would refer to s. 11 C of the Act. Sub-section (1) of this section provides that every claim, proceeding or other matter of a civil nature arising out of this Act shall be commenced as if it were a civil suit and regulated by the provisions of the Civil Procedure Code 1966; but sub-s. (2) gives the court power to take cognizance of any matter which it may have power to take under the Act and to settle the issues and proceed to try these issues as in the civil suit.

In this case the appellant filed his application as a Chamber Summons and usually evidence in a Chamber Summons is given by affidavits. There is undoubtedly, however, power for the court on any Chamber Summons to direct that oral evidence be taken and in that event the matter is adjourned into open court: see O. 18 r. 4 of the Civil Procedure Code 1966. Order 19 deals with evidence by affidavit. The court may at any time order any particular fact or facts to be proved by affidavit and may on the application of either party order a deponent to attend for cross-examination. As I stated the appellant in this case brought this application by way of Chamber Summons and this was supported by an affidavit. The application came before the Senior Resident Magistrate in Dar-es-Salaam and there, on the application of the advocates for both sides, he decided and ordered the mode of trial and gave permission for the filing of a counter affidavit by the respondent and for the appellant to file an affidavit in reply.

In accordance with this order the application duly came on for hearing in chambers on May 10, 1968, before the Senior Resident Magistrate, who after hearing submissions by the advocates for the parties reserved his ruling and delivered this on May 18, 1968, dismissing the application. The application was heard on the evidence contained in the appellant's affidavit and in the counter affidavit filed by the respondent. The appellant did not file an affidavit in reply, and no application was made to the court to allow cross-examination of either of the deponents.

Mr. Peera for the appellant did, however, in the course of his argument say that the question as to whether rent had been paid did call for oral evidence and then he said: "I want to call evidence on my third point."

The record of appeal does not contain a direct ruling by the Senior Resident Magistrate on this application. It is, however, apparent that the application was not granted, as the magistrate proceeded to make his ruling without allowing any oral evidence to be called; and it does appear that this was the position as understood by the parties, as in his final reply Mr. Peera did say:

> "There is already evidence in the form of affidavit. For eleven months applicant was lulled into a sense of security until he was suddenly pounced upon. Execution must be postponed until matter is rectified. Court is invited to take this into account."

In his ruling the Senior Resident Magistrate said this:

> "As for the variation of the order, I cannot say that this argument is even worth dwelling upon lengthily. With this consent order in force the applicant would have been liable to pay mesne profits as long as he was in occupation of the suit premises. And while the respondents awaited execution of the decree, they would have been unwise to refuse to accept such monies. The

> question of varying this order cannot therefore be said to have arisen, in the absence of a clear and unequivocal consent between the parties."

There can be no question but that the magistrate was completely justified in finding that there was no proof of a clear and unequivocal consent between the parties on the evidence before him. The appellant's affidavit was vague and incomplete, e.g. it referred to the payment of rent but did not state the amounts paid, nor was any receipt for these payments exhibited, it referred to a request for the payment of rent contained in a letter dated January 27, 1967, but this letter was also not exhibited. The counter-affidavit denies the existence of any tenancy or the payment of any rent and explains that any amounts received were in respect of mesne profits in accordance with the consent order. The counter-affidavit did not however explain the long delay in applying for possession. The appellant did not file an affidavit in reply. It would have been, in my view, impossible for the magistrate on this evidence to have found that a new tenancy agreement existed.

This matter has given me much concern having regard to the possibility of an injustice being done to the appellant especially having regard to the unexplained delay of some eleven months in applying for the execution of the order. The question, however, as to whether he would allow oral evidence to be called was a matter in the magistrate's discretion and it does appear that the appellant has only himself to blame for the lack of the evidence. The onus was on the appellant to prove circumstances which would justify a variation of the order for possession and he has not done so. He could, if in fact a new agreement was entered into, have proved this by filing a proper and complete affidavit with the attachments that I have mentioned, or may have done so by an affidavit in reply. Then, further, he could have applied for permission to cross-examine the deponent on the affidavit filed by the respondent; and there is also the fact that he had agreed to the order made by the magistrate for this matter to be heard in chambers and on affidavit evidence. The appellant had full opportunity to prove his case, if it did in fact exist, and failed to do so.

There is one other point which I would deal with, although this is not a ground of appeal. The magistrate did in his ruling find that this application must have necessarily failed as the court could not go behind a consent order. With respect this clearly is wrong. As I have pointed out the court cannot in fact make a consent order under s. 19 of the Act but may do so on admissions made by the parties. The provisions of s. 19 (5) are very wide and would cover all orders made under s.19 even if, in fact, there could be such a thing as a "consent order". As I have pointed out the intention of the legislature was to allow the courts to retain control over the question of possession of the premises until any order for possession had been executed. We were in this respect referred to the case of *Karim v. Ahmed* (1953), 20 E.A.C.A. 63, a judgment of this Court, but this judgment was on the interpretation of s. 10 (4) of the Rent Restriction Ordinance of Aden which is quite different to our s. 19 (5). In this respect it might be useful if I refer to the judgment of the English case of *Rossiter v. Langley*, [1925] 1 K.B. 741, at p. 744, and to the following extract from the judgment of Salter, J., when he was dealing with the provisions of s. 5 (2) of the English Increase of Rent and Mortgage Interest (Restrictions) Act 1920, which is similar to the provisions of our sub-s. (5):

> "I cannot imagine wider words. [His Lordship read sub-s. 2.] That is obviously a provision intended to be wholly in the interest of and for the protection of the tenant, and to give to the county court judge, who has been invested with a wide discretion in making the order, an equally wide discretion to deal with it up to the last moment. That power was given in

> express terms. The question is whether we have any warrant to limit that discretion to cases where the original order was not made by consent."

The learned judge then went on to find that the Court had authority to deal with any order, whether made by consent or not, and he referred to the case of *Wellesley v. White*, [1921] 2 K.B. 204, which was quoted in the judgment of this Court in the *Karim v. Ahmed* case as follows:

> "With regard to *Wellesley v. White*, I do not think we are necessarily differing from the decision of the Divisional Court in that case. The agreement there was made before the Act of 1920 came into operation, and the application was made under s. 5, sub-s. 3. I think the county court judge, in holding that he had no jurisdiction to consider the application by the tenant, was wrong, and that this appeal should be allowed."

The Senior Resident Magistrate was in my view wrong in coming to the conclusion that he could not go behind this order, but on the evidence before him, he was fully justified in dismissing the application and indeed he could not properly have arrived at any other decision.

I would therefore dismiss this appeal with costs to the respondent.

Law JA: The facts giving rise to this appeal are fully stated in the judgment prepared by Duffus, J.A., which I have had the advantage of reading in draft. So far as the first three grounds of appeal are concerned, Mr. Peera for the appellant tenant submitted that a Rent Restriction Board had no jurisdiction to make a consent order, being prohibited from acting without proof of facts establishing that the grounds for the application existed, and that it would be reasonable to make the order sought. An order based solely on the consent of the parties without investigation by the Board amounts in Mr. Peera's submission to the conferring of a jurisdiction on the Board beyond that which the legislature has seen fit to confer, and, relying on *Barton v. Fincham*, [1921] 2 K.B. 291, Mr. Peera submitted that such an order is invalid and incapable of execution, and should be set aside as a nullity. *Barton's* case was considered and distinguished by the Court of Appeal in England in *Thorne v. Smith*, [1947] 1 All E.R. 39, and in the course of his judgment Bucknill, L.J., said:

> "But in the present case it is, I think, reasonably clear that the tenant, in effect, agreed to the order because at the time when the landlord asked the court to make the order the landlord by his own statements had satisfied the tenant that he intended to occupy the house himself and he, the tenant, could not hope successfully to resist the claim. If the tenant had stated this expressly in court the judge would surely have had jurisdiction to make the order on that ground. I think in the events which happened here, the tenant being legally represented, the judge was entitled to proceed on the view that this was the true position. Before making an order for possession the judge is under a duty to satisfy himself as to the truth if there be a dispute between landlord and tenant, but if the tenant in effect agrees that the landlord has a good claim to an order under the Acts, I think the judge has jurisdiction to make the order for possession under the Act, without further inquiry."

This passage, with which I respectfully agree, and which was considered with approval in *Middleton v. Baldock*, [1950] 1 K.B. 657, disposes in my view of the first three grounds of appeal. The landlord had claimed possession on the ground that he reasonably required the premises for his own occupation, a ground on which the Board had jurisdiction to make an order for possession if satisfied as to the truth of the claim. The tenant, who was represented by counsel, consented to such an order being made. This consent in my opinion amounted

to an admission of the truth of the grounds on which the landlord claimed possession, and justified the Board in making the order sought without further inquiry.

The fourth ground of appeal was that the appellant had been denied the opportunity by the Resident Magistrate, to whom he has applied under s. 19 (5) of the Rent Restriction Act to discharge, postpone or stay execution of the order, to present further evidence in support of his application. I agree with Duffus, J.A., that the learned magistrate was wrong in holding that he could not go behind a consent order. Section 19 (5) aforesaid confers upon the court very wide powers to stay, suspend or even rescind an order which has been made but not executed, and I do not consider that the fact that the order had been made by consent affects the position. But the magistrate's primary reason for refusing the tenant's application was that he did not believe, on the evidence before him, that the consent order had been varied by agreement of the parties and a new tenancy substituted. According to the tenant's affidavit in support of his application, the creation of this new tenancy was evidenced by a letter from the landlord's agent dated January 27, 1967. No such letter was annexed to the affidavit, and the creation of a new tenancy was denied by the landlord in his counter-affidavit. No application was made on the tenant's behalf to cross-examine the landlord on his affidavit, and the magistrate did not specifically deal with an application by Mr. Peera to adduce oral evidence in amplification of the tenant's affidavit. The magistrate's reasons for not hearing further evidence are however apparent from his "ruling". He simply did not believe that a new tenancy had been substituted for the consent order for possession. On the evidence before him, this was in my opinion a reasonable finding on the part of the magistrate. Whether or not to allow oral evidence to be adduced was a matter within the magistrate's discretion, and I am unable to say that he wrongly exercised his discretion in this case, having regard to the unconvincing allegation of the creation of a new tenancy in the tenant's affidavit. On the face of it, there could be no reason why the landlord should have consented to a new tenancy. It was admitted by the tenant that the rent remained the same, and it is most unlikely that the landlord for no apparent consideration would have abandoned the benefit of the order for possession which he had obtained in his favour.

I agree with Duffus, J.A., that this appeal should be dismissed, and I concur in the order proposed by him.

Sir Charles Newbold P: I have had the advantage of reading in draft the judgments of Duffus, J.A., and Law, J.A., and I agree with them. I would only add that I notice, not unfortunately for the first time, that the affidavits in this application were used as a form of pleading. This is an improper practice (see O. 19, r. 3 (1)) and should cease.

There will be an order in the terms proposed by Duffus, J.A.

Appeal dismissed.

For the appellant:
IG Peera
Donaldson & Wood, Dar-es-Salaam

For the respondent:
Harjit Singh
Harjit Singh, Dar-es-Salaam

Mbunde v Republic
[1969] 1 EA 475 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	23 October 1968
Case Number:	466/1968 (71/69)
Before:	Biron J
Sourced by:	LawAfrica

[1] Criminal Law – Intent – Whether intent to defraud or deceive includes theft – Penal Code (*Cap.* 16), *s.* 346 (*T.*).

[2] Criminal Practice and Procedure – Misdirection on burden of proof – No miscarriage of justice.

[3] Criminal Practice and Procedure – Substitution of convictions – For stealing and attempted stealing by convictions for obtaining and attempting to obtain by false pretences – Criminal Procedure Code (*Cap.* 20), *s.* 187 (*T.*).

[4] Criminal Practice and Procedure – Sentence – Minimum Sentences Act (*Cap.* 526) (*T.*) *– Factors affecting exercise of judge's discretion to give lesser sentence.*

Editor's Summary

The appellant, a clerk employed by the Tanzanian Government, obtained and attempted to obtain a quantity of petrol from a trader by issuing an unauthorised Government local purchase order. The District Magistrate convicted the appellant on three counts of stealing and one count of attempting to steal as a public servant; but acquitted him of the counts of making documents without lawful authority with intent to defraud or deceive, and of uttering them. The appellant was sentenced to two years' imprisonment for each of the stealing offences and six months for the attempted stealing under the Minimum Sentences Act.

Held –

(i) although the magistrate had gravely misdirected himself on the burden of proof by holding that it was the duty of the accused to prove his innocence, the misdirection did not occasion any failure of justice on the facts of this case;

(ii) as the petrol belonged to the trader and not to the Government, and as property in it was obtained by false pretences so that it was therefore not stolen, the convictions for stealing and attempting to steal were quashed and convictions for obtaining and attempting to obtain by false pretences were substituted as provided by s. 187, Criminal Procedure Code;

(iii) the documents were made and uttered in the commission of the offences of obtaining and attempting to obtain by false pretences, and therefore they were made and uttered with intent to defraud or deceive;

(iv) to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action; (definition in *Re London and Globe Finance Corporation Ltd.* (1) adopted);

(v) the sentence would be reduced because the substituted convictions were not scheduled under the Minimum Sentences Act; and although the theft of the Government local purchase orders was so scheduled their value was such as to give the judge a discretion to give a lesser sentence.

Observation: if the making and uttering of the Government local purchase orders had been done with intent to steal that would not have constituted the offences of making and uttering without authority documents with intent to defraud or deceive contrary to s. 346, Penal Code.

Appeal against conviction and sentence allowed to extent indicated.

Cases referred to in judgment:

(1) *Re London and Globe Finance Corporation Ltd*., [1903] 1 Ch. 728.

Judgment

Biron J: The appellant was charged on eight counts, two of making false documents without authority contrary to s. 346 (1) of the Penal Code, two of uttering them, three counts of stealing by a person employed in the public service and one count of attempted stealing by a person employed in the public service. He was acquitted on the charges of making and uttering false documents and convicted on the three counts of stealing as a public servant and the count of attempting to steal as a public servant. He was sentenced to imprisonment for two years on each of the convictions for stealing and to imprisonment for six months on that of attempted stealing, all the sentences of imprisonment to run concurrently, and to the statutory twenty-four strokes corporal punishment. He is now appealing.

The appellant was at the material time employed as a clerk in the Ministry of Education and stationed at Mahenge. It was established in evidence that he prepared and signed three local purchase orders for the supply of petrol from a merchant, one Daimon G. Somji. One local purchase order was for the supply of 20 gallons, which the appellant himself collected on August 18, 1967. The driver employed by the district education office testified that he did not collect any petrol on the day in question, nor was the office vehicle used on that day. And this was confirmed by other evidence as well. It was also established in evidence, apparently not disputed, that the appellant prepared and signed two other local purchase orders, also for the supply of petrol. The daughter of the merchant Daimon G. Somji testified that the appellant brought these two local purchase orders, one at a time, to her father's shop, wherein she was serving. The first one was apparently improperly completed. It was therefore cancelled and he brought the second one, which was apparently for the supply of 25 gallons of petrol. The witness stated that the appellant left this local purchase order with her and said that he would return later to collect the petrol. He did not however return or collect the petrol. Evidence was given by a school inspector and the local district education officer to the effect that although the appellant had previously been authorised to sign local purchase orders, such authority had been withdrawn and he was expressly forbidden to sign, his duty being limited to preparing local purchase orders for signature by his superior officers. The preparation and uttering of the local purchase orders formed the basis of the charges of making and uttering unauthorised documents; the obtaining of the 20 gallons of petrol from Daimon G. Somji was the basis of the charge of stealing the petrol; whilst the preparation and deposit with Somji's daughter of the other two local purchase orders formed the basis of the charge of attempting to steal the petrol. The other two counts of stealing were in respect of the two local purchase orders which were subsequently handed to Somji's daughter and which the appellant, according to the prosecution, took from the district office without authority, actually whilst on a visit to the office when he was on leave.

The appellant's defence was to the effect that he was authorised to sign local purchase orders. He admitted having taken gallons of petrol from Somji's shop, but asserted that he was together with the driver, and that the petrol was put in the tank of the office vehicle. Although the appellant gave evidence on oath and was cross-examined, there does not appear to be any reference in his evidence as to his having taken the other two local purchase orders and left them with Somji's daughter on the understanding that he would collect the petrol later, except possibly a denial of this by implication, as his

evidence lacks clarity.

The learned magistrate on the evidence before him found, as he was entitled to, that the appellant was not authorised to sign local purchase orders. Even so, he acquitted him on the charges of making documents without authority and uttering such documents, stating in his judgment – and I think it is necessary to quote verbatim:

> "Now definition of making document without authority: any person who makes with intent to defraud or deceive without lawful authority is guilty of the offence but accused had no intention to defraud but had intention of stealing so in this charge accused is not guilty. In the second count uttering a false document c/s 346 (2) any person who knowingly utters any document or writing so that it may (be) executed by another person but accused did not utter the document so that it may be signed by another but he signed himself so in the second count accused is not guilty. In the fourth and fifth counts making false document and uttering false document accused is also not guilty."

I propose to revert to these charges and the acquittal thereon subsequently in this judgment.

With regard to the other offences, the learned magistrate accepted the evidence of the prosecution witnesses, and, rejecting that of the defence, found that the 20 gallons of petrol, which the appellant himself admitted having obtained from Somji's shop, did not find its way to the office vehicle as asserted by the appellant, but was converted by him to his own use. He accordingly convicted him of stealing this petrol. Likewise, with regard to the other quantity of petrol the appellant attempted to obtain from Somji's daughter, he convicted him of attempting to steal this petrol, as charged.

The magistrate misdirected himself on the burden of proof, stating in his judgment:

> "These evidences against accused have been so strong and accused could not even at a small point move the burden of proof against him. It was the duty of accused to prove his innocence before this court what so ever he could not rebut the prosecution witnesses."

Except in very exceptional circumstances, which were not present here, the burden of proof in a criminal case never shifts to an accused; it remains throughout on the prosecution to establish the guilt of the accused. Although the learned magistrate has so gravely misdirected himself on the burden of proof, in this instant case the misdirection has not occasioned any failure of justice, in that, in my judgment, the evidence overwhelmingly establishes that the appellant obtained and converted to his own use 20 gallons of petrol on the production of a local purchase order signed by him without authority. Even so, such fraudulent obtaining does not constitute the offence of theft, but that of obtaining property by false pretences, the property, incidentally, being that of Somji, and not that of the Government. As Somji voluntarily parted with the petrol, that is, the property in the petrol, not only possession, on the production of the local purchase order, which he believed to be genuinely authorised, the obtaining by the appellant by means of the unauthorised local purchase order constitutes obtaining by false pretences, as opposed to theft, to constitute which the owner parts only with possession and not with title to, or ownership in, the property. Likewise, and for the same reasons, the attempt to obtain the other quantity of petrol by the production of the other unauthorised local purchase order constitutes the offence of attempting to obtain petrol by false pretences, and not that of attempting to steal the petrol.

It now remains to deal with the convictions for stealing the local purchase

orders. Although learned State Attorney has expressed doubts as to their property, I consider that, as the appellant had no right to take these documents, his taking them and using them thus depriving the owner, that is, the Government, of them, he stole them. These two convictions are thus fully supported and justified by the evidence.

To revert to the charges of preparing documents without authority and uttering them, and the acquittals thereon, I must confess at once that this is the first time I have ever seen such charges brought in the courts of this country, nor am I aware of any corresponding provision under English law, whence our own originates, or even under the Indian Penal Code, the source of our own Code, and on which it is modelled. It is therefore by no means surprising that these charges occasioned the learned magistrate difficulty. Whilst I am, with respect, inclined to agree with him that if the making of these local purchase orders was with intent to steal, that would not constitute the offence, though it is really extraordinary why it should not, as I have found that these documents were used in the commission of the offences of obtaining by false pretences and of attempting to obtain by false pretences, then the making of such documents was done with intent to defraud. “To defraud” and “to deceive” (the expressions used in the section) have been defined in the judgment of Buckley, J., in *Re London and Globe Finance Corporation Ltd*., [1903] 1 Ch. 728, at p. 732, the locus classicus on the definition of these two terms, and the distinction between them, as:

> “To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.”

Therefore the appellant, if he had been properly convicted of obtaining by false pretences and of attempting to obtain by false pretences, could have been convicted on the charges of preparing the local purchase orders without authority. The magistrate misdirected himself in the passage quoted on the offence of uttering such documents, referring to them as false documents and finding that they were not in fact false. Whilst his finding that the documents were not false, that is, within the context of the offences of forgery and uttering false documents, was perfectly correct, these instant charges were not concerned with uttering false documents. The learned magistrate was doubtless misled by the wording of the charge sheet, in that the statement of the second count is set out as “uttering a false document”. Incidentally, the charge sheet was also wrongly phrased on the fourth count, that of making a document without authority, in that the statement reads “making false documents contrary to section 346”. All the foregoing is, strictly speaking, obiter, but the learned magistrate may find it not without interest.

In the result, insofar as the convictions are concerned, the convictions for stealing petrol the property of the Government, and attempting to steal the property of the Government, are quashed and, as empowered by s. 187 of the Criminal Procedure Code, there are substituted for such convictions, respectively, a conviction for obtaining petrol by false pretences, and a conviction for attempting to obtain petrol by false pretences, contrary to s. 302 of the Penal Code. As indicated, the convictions for stealing the local purchase orders remain undisturbed.

With regard to sentences, the offence of obtaining property by false pretences is not a scheduled offence, likewise the attempt to commit such offence is also not a scheduled offence, under the Minimum Sentences Act. The sentences

imposed in respect of such convictions as varied in this judgment, are therefore ultra vires, and are accordingly set aside. The thefts of the local purchase orders are, however, scheduled offences. Even so, the appellant was a first offender for the purposes of the Minimum Sentences Act, and the value of the property concerned, even if the figure of Shs. 1/- each is accepted – which, to my mind, is an over-valuation – is well within the prescribed limit to qualify the appellant for the exercise of the court's discretion to impose a sentence less than the prescribed minimum where it finds special circumstances within the meaning of the Act. As the appellant was convicted of stealing as a public servant Government property, the value of which exceeds Shs. 100/-, and the court had no discretion to impose a sentence less than the prescribed minimum, the magistrate did not, as it was not necessary, consider the question of special circumstances. Even so, I am not persuaded that the proceedings should be returned to the convicting court for the magistrate to consider such aspect as, to my mind, there is sufficient material in the proceedings, which includes the appellant's statement in mitigation that he had a wife and two children, as well as his brothers, dependent on him, for this court to deal with the matter itself.

In all the circumstances, and considering the case against its background, I consider that justice would be met if the appellant were sentenced to imprisonment for one year. The sentences are accordingly all set aside and for each there is substituted a sentence of imprisonment for one year, all the sentences to run concurrently with one another.

To the extent indicated, this appeal is allowed.

Order accordingly.

The appellant was not represented.

For the respondent:
JS Warioba (State Attorney, Tanzania)
Attorney-General, Tanzania

Chilemba v Republic
[1969] 1 EA 479 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	30 October, 1968
Case Number:	503/1968 (72/69)
Before:	Biron J
Sourced by:	LawAfrica

[1] Criminal practice and procedure – Sentence-Concurrent – With previous sentence – Whether Court can order a sentence to run concurrently with a previous sentence as from the date the previous sentence itself commenced to run – Criminal Procedure Code (*Cap.* 16), *s.* 36 (*T.*).

Editor's Summary

The appellant, having been convicted on his own plea and sentenced to nine months' imprisonment on a charge of stealing by a person employed in the public service, was subsequently charged with and also pleaded guilty to four other similar charges, and then sentenced to two years concurrent on each count, and twenty-four strokes. He appealed against these latter sentences and raised the point that they could and should have been made to run concurrently with the previous sentence.

Held – a court is empowered by s. 295 of the Criminal Procedure Code as read with s. 36 of the Penal Code to order a sentence to run concurrently with a previous sentence as from the date the previous sentence itself commenced to run.

Appeal allowed. Later sentence order to run concurrently with the previous sentence.

No cases referred to in judgment

Judgment

Biron J: The appellant was convicted, on his pleas, on four counts of stealing as a public servant, and he was sentenced to imprisonment for two years on each count, to run concurrently, and to the statutory twenty-four strokes corporal punishment.

The appellant was at the material time employed as chief clerk in the Lindi Regional Office, and in such capacity he received various sums of money from members of the public which he converted to his own use, and these thefts form the subject matter of the four counts on which he was convicted on July 10, 1968. However, on April 20, about three months previously, the appellant had been convicted, also on his own plea, on a similar charge of stealing a sum of money in the course of his duties. As this sum was less than Shs. 100/-, and he was a first offender, the court in the exercise of its discretion awarded him a sentence of imprisonment for nine months.

In sentencing the appellant in this instant case, the learned magistrate remarked, very pertinently and properly, that the charge on which he was convicted in April should have been laid together with all these other charges. It is however possible that the other offences may not have been discovered until later and therefore were not brought together.

The appellant is not appealing from the convictions, in respect of which, incidentally, no appeal lies, as he unequivocally pleaded guilty; but he makes the point that he should have been convicted on all the five counts at one trial when, so he contends, all the sentences would have been ordered to run concurrently. As it is, the sentences imposed in this instant case will commence on the expiry of the sentence imposed in the previous case.

In his petition of appeal the appellant pleads – and I quote verbatim –

> ". . . I pray to the Honourable Judge of the High Court of Tanzania, Dar-es-Salaam, to review the sentences laid upon me, as it was quite behind to my life expectation. The offences alleged to have been committed is for the first time for the duration of nine (9) years I have served the Government faithfully."

Although I do not subscribe to this pessimistic view of the appellant's expectation of life, particularly as his age is given in the charge sheet as twenty-seven years, apart from his long service with the Government, as remarked by the learned magistrate in sentencing the appellant, it was to his credit that he pleaded guilty. It is generally, if not universally, recognised that an accused pleading guilty to an offence with which he is charged qualifies him for the exercise of mercy from the court. The reason is, I think, obvious, in that one of the main objects of punishment is the reformation of the offender. Contrition is the first step towards reformation, and a confession to a crime, as opposed to brazening it out, is an indication of contrition. Therefore in such a case a court can and does impose a milder sentence than it would otherwise have done.

By s. 295 of the Criminal Procedure Code as amended by the Criminal Procedure Code (Amendment) Act 1963 (by the addition of the words "or in the Penal Code" at the end thereof):

> ". . . Every sentence shall be deemed to commence from, and to include,

> the whole of the day of the date on which it was pronounced, except where otherwise provided in this Code or in the Penal Code."

It is evident from the respective provisions of the Penal Code and the Criminal Procedure Code, before that in the latter was amended by the addition of the words "in the Penal Code", the power of a court to order a sentence of imprisonment to run concurrently with a previous one imposed was limited to ordering it to run concurrently with only the unexpired portion of such previous sentence, as there is no provision in the Criminal Procedure Code which permits a court to order a sentence of imprisonment to commence to run earlier than the day on which it is pronounced. On my construction of the two sections read together as now amended, a court is empowered to order a sentence to run concurrently with a previous sentence as from the date the previous sentence itself commenced to run. I am fortified in my so interpreting the two sections by the statement in the Objects and Reasons in the Bill for the amending Act, wherein it is stated that clause 16 (which amends the section by the addition of the words "or in the Penal Code") "would make a minor amendment to s. 295 of the Code designed to remove an inconsistency". If s. 36 of the Penal Code were construed as limiting the powers to order a sentence to run concurrently with a previous one, with only the unexpired portion thereof, there would be no inconsistency between that section and s. 295 of the Criminal Procedure Code before it was amended.

It may perhaps seem odd that a court cannot order a sentence to commence to run prior to the date on which it is pronounced so as to embrace, for example, the time spent by an accused in custody awaiting trial, that is, to order the sentence to run from the date of arrest – which, incidentally, in my view, is a distinct desideratum, particularly on convictions for scheduled offences, where the court must impose the prescribed minimum sentence, thereby precluding it from taking into consideration the time spent by the accused in custody awaiting trial, as is normally done – but where an accused is already serving a sentence of imprisonment, a court can order a sentence subsequently awarded to commence earlier than the date on which it is pronounced. That, however, is by the way.

As, I think, demonstrated, it is clear from the learned magistrate's remarks, with which, with respect, I agree, that he was of the view that all the charges should have been brought together, and if they had been so brought he would have imposed concurrent sentences of imprisonment on the convictions in respect of such charges.

In the result, the appeal is allowed, and it is ordered that the sentences imposed in this case, which have been ordered to run concurrently with each other, are to run concurrently with that imposed in Lindi Criminal Case No. 549, that is, from April 20, 1968.

Order accordingly.

The appellant did not appear and was not represented.

For the respondent:
Mrs VM Chirwa (State Attorney, Tanzania)
Attorney-General, Tanzania

Fernandes v Commercial Bank of Africa Ltd and another

[1969] 1 EA 482 (HCK)

Division:	High Court of Kenya at Mombasa
Date of judgment:	4 October 1968
Case Number:	147/1967 (73/69)
Before:	Mosdell J
Sourced by:	LawAfrica

[1] Abuse of civil process – Wrongful arrest – Malice – Whether shown.

[2] Abuse of civil process – Wrongful arrest – Reasonable and probable cause – Whether shown.

[3] Civil Practice and Procedure – Arrest before judgment – Delay or obstruction after decree – Civil Procedure (*Revised*) *Rules* 1948, *O.* 38, *r.* 1 (*b*) (*K.*).

[4] Civil Practice and Procedure – Arrest before judgment – Likelihood of obstruction or delay.

[5] Damages – Wrongful arrest – Measure of.

Editor's Summary

The first defendant through its manager the second defendant acting on legal advice applied for the arrest of the plaintiff before judgment on the ground that he was leaving Kenya. The plaintiff was arrested in Nairobi on the day before he was due to fly to India and was escorted to Mombasa. On his appearance before a judge, the order nisi was discharged, and he was released, on the grounds that the affidavit in support of the application did not disclose facts indicating a reasonable probability of damage occurring. The plaintiff then sued the defendant for damages for wrongful arrest alleging that the second defendant acted maliciously and without reasonable and probable cause.

Held -

(i) delay or obstruction prior to the granting of a decree is irrelevant to an application under O. 38, r. 1 (*b*), Civil Procedure (Revised) Rules 1948;

(ii) where a defendant remains out of Kenya permanently or for a protracted period execution of a decree against him is likely to be obstructed or delayed;

(iii) there was no malice on the part of the second defendant who acted to protect the interests of the first defendant and after having taken legal advice;

(iv) that facts indicating reasonable probability of damage were not stated in the affidavit did not mean necessarily that the second defendant acted without reasonable and probable cause;

(v) on the facts the second defendant had reasonable and probable cause for the action he took;

(vi) had damages been awarded these would have been nominal.

Suit dismissed.

Cases referred to in judgment:

(1) *Broad v. Ham* (1839), 5 Bing N.C. 722; 132 E.R. 1278.

(2) *Turner v. Ambler* (1847), 10 Q.B. 252; 116 E.R. 98.

(3) *Hicks v. Faulkner* (1881), 8 Q.B.D. 167.

(4) *Abrath v. North Eastern Ry*. (1886), 11 App. Cas. 247.

(5) *Herniman v. Smith*, [1938] A.C. 305.

(6) *Tims v. John Lewis & Co. Ltd*., [1951] 2 K.B. 459.

(7) *John Lewis & Co. Ltd. v. Tims*, [1952] A.C. 676.

Judgment

Mosdell J: This is a claim for damages by the plaintiff Mr. Fernandes against the Commercial Bank of Africa Ltd. and the manager of the Mombasa branch of the said Bank Mr. Hollander for wrongful arrest. Some facts are not in dispute. Shortly they are as follows. In 1965 the plaintiff was a director of a firm known as Kilimanjaro Tours & Safaris Ltd. (hereinafter called "the firm") in Mombasa. The second defendant had granted this firm banking facilities and had advanced it some funds. As security the second defendant had taken a debenture over the assets of the firm including its vehicles. As further security the second defendant had obtained guarantees from the plaintiff and other directors of the firm. There was as at April 9, 1965, the sum of Shs. 57,000/- odd owing to the first defendant by the firm. The first defendant sued the plaintiff as such guarantor to recover the said sum. Contemporaneously with the filing of the plaint the first defendant filed an application under O. 38, r. 1 of the Civil Procedure (Revised) Rules 1948 for the issue of a warrant of arrest whereby the plaintiff might be arrested and brought before the court to show cause why he should not furnish security for his appearance. The application was grounded on two affidavits, from the second defendant and a Mr. Elliott of the Night Security Organization (Mombasa) Ltd., respectively. On May 28, 1965, the application was heard by Wicks, J. He ordered a warrant of arrest to issue requiring the plaintiff to show cause why he should not provide security in the sum of Shs. 59,000/-. On May 29, 1965, the plaintiff was arrested in Nairobi and escorted to Mombasa. He was due to fly to India on May 30, 1965. He appeared before Wicks, J., under arrest on May 31, 1965, when by consent the matter was adjourned to June 4, 1965. On depositing his passport with the court and on giving his personal undertaking to appear on June 4, 1965, the plaintiff was released from arrest. On June 4, 1965, the plaintiff again appeared before Wicks, J., when the order nisi was discharged.

Order 38, rule 1 reads as follows:

"ORDER 38

Arrest and Attachment before Judgment

1. Where at any stage of a suit, other than a suit of the nature referred to in section 12 of the Ordinance, paragraphs (*a*) to (*d*), the Court is satisfied by affidavit or otherwise –

 (*a*) that the defendant with intent to delay the plaintiff, or to avoid any process of the Court, or to obstruct or delay the execution of any decree that may be passed against him –

 (i) has absconded or left the local limits of the jurisdiction of the Court; or

 (ii) is about to abscond or leave the local limits of the jurisdiction of the Court; or

 (iii) has disposed of or removed from the local limits of the jurisdiction of the Court his property or any part thereof; or

 (*b*) that the defendant is about to leave the Colony under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any Decree that may be passed against the defendant in the suit;

 the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance:

 Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in

deposit by the Court until the suit is disposed of or until the further order of the Court."

It was under rule 1 (*b*) of this Order that the defendants purported to act. The affidavit of Mr. Hollander sworn on May 28, 1965, reads as follows:

"I, CHRISTIAN HOLLANDER of Mombasa in the Republic of Kenya Bank Official, MAKE OATH AND SAY as follows:

1. That I am the Manager of the Mombasa Branch of the Plaintiff and am duly authorised to make this Affidavit on its behalf.
2. That the Defendant is justly and truly indebted to the Plaintiff in the sum of Shs. 57,054.22 as a guarantor of the company known as Kilimanjaro Tours & Safaris Limited by reason of the facts and matters stated in the Plaint filed herein.
3. That the Defendant has despite demand duly made neglected or refused to pay to the plaintiff the said sum of Shs. 57,054.22 or any part thereof or at all.
4. That I am informed and verily believe that the Defendant is about to leave the said Republic and I crave leave to refer in this connection to the Affidavit of John Edgar Elliott filed in this suit.
5. That I verily believe that if the Defendant does leave the said Republic and/or the local limits of the jurisdiction of this Honourable Court the Plaintiff will or may thereby be obstructed or delayed in the execution of any decree which may be passed against the Defendant in this suit.
6. That the contents of this Affidavit, which I make in support of an application on the part of the Plaintiff that this Honourable Court be pleased (*inter alia*) to order the issue of a warrant to arrest the Defendant and bring him before the Court to show cause why he should not furnish security for his appearance, are true and within my own knowledge except where otherwise stated."

The affidavit of Mr. Elliott, also sworn on May 28, 1965, reads as follows:

"I JOHN EDGAR ELLIOTT of Mombasa in the Republic of Kenya MAKE OATH AND SAY as follows:

1. That I am the Managing Director of Night Security Organization (Mombasa) Limited at Mombasa aforesaid a company carrying on business as (*inter alia*) private enquiry agents.
2. That on instructions received on the 26th day of May 1965 from Messrs. Bryson & Bowyer of Mombasa aforesaid advocates for the Plaintiff herein, I caused enquiries to be made concerning the intended movements of the Defendant herein with particular reference to the possibility that he might be contemplating leaving the said Republic in the near future.
3. That as a result of such enquiries I ascertained and verily believe that the Defendant intends to leave the said Republic on Sunday the 30th day of May 1965 he having booked a passage on Air India Flight No. 202 which on that day is scheduled to leave Nairobi for Aden and Bombay.
4. The contents of this Affidavit are true to the best of my knowledge and belief."

The plaintiff's claim is perhaps best expressed in terms of the plaint, paragraphs 5 to 8 of which read as follows:

"5. The Second Defendant, as the manager of the First Defendant's branch at Mombasa in the course of his employment with the First

Defendant and or as the First Defendant's agent, maliciously and without reasonable or probable cause, by making a false affidavit on an application made on behalf of the First Defendant pursuant to Order 38 Rule 1 (*b*) of the Civil Procedure (Revised) Rules 1948 in an action then pending in the High Court of Kenya at Mombasa District Registry being Civil Case No. 137 of 1965 between the First Defendant herein as the plaintiff and the Plaintiff herein as the defendant, caused and procured an order to be made by the Honourable Mr. Justice James Wicks on the 28th day of May, 1965, whereby it was ordered that the Plaintiff should be arrested as therein mentioned, and maliciously and without reasonable or probable cause procured the Plaintiff to be arrested at Nairobi on the 29th day of May, 1965 under the said order. The Plaintiff was pursuant to the said order brought from Nairobi to Mombasa under arrest and on 31st May, 1965 he was released by the Court from arrest on his depositing his passport with the Court and on giving his personal undertaking to appear in Court on the 4th June, 1965 at the hearing of a notice to show cause why he should not furnish security for his appearance as required under the said Order.

PARTICULARS:

The affidavit was false in the following particulars:

(1) That the belief deposed to by the Second Defendant in paragraph 5 of his affidavit was false and not a bona fide belief and that there were no circumstances or grounds on which the Second Defendant could have held such a belief bona fide.

(2) That paragraph 5 of the said affidavit was false in as much as it stated or suggested that the Plaintiff herein (who was the Defendant in High Court Civil Case No. 137 of 1965) was about to leave the Republic of Kenya under circumstances affording reasonable probability that the First Defendant herein (who was the Plaintiff in the said High Court case) would or might thereby be obstructed or delayed in the execution of any Decree that might be passed against the Plaintiff in the said case.

(3) That it omitted to state or suppressed the following facts which the Second Defendant knew or could have known on making a reasonable enquiry:

(*a*) That the Plaintiff was a prominent business man of Mombasa and was a man of considerable means holding considerable shares and interest in various companies and firms in East Africa and particularly in Kenya;

(*b*) That the Plaintiff was the owner of a house at Haile Selassie Road, Mombasa, of the approximate value of Shs. 45,000/- which was free from encumbrances;

(*c*) That the Plaintiff was a permanent resident of Kenya and that he was then proceeding on a short business visit to India and that he was returning to Kenya within a fortnight;

(*d*) That the sum of Shs. 57,054/22 cts in respect whereof the said High Court Case No. 137 of 1965 was filed against the Plaintiff herein as a guarantor of the Company known as Kilimanjaro Tours & Safaris Limited was also secured by a Debenture issued by the said Company in favour of the First Defendant on all its properties and assets including fourteen motor vehicles belonging to the Company which were then of the total value of more than Shs. 60,000/- and that the registration books of the said vehicles were also held by the First Defendant as a security for the said debt.

6. The Plaintiff avers that at all material times the Second Defendant was acting as aforesaid as the manager of the First Defendant in the course of his employment and within the scope of his authority and or as the agent of the First Defendant and that the Second Defendant was duly authorised by the First Defendant to make the aforesaid affidavit.

7. Alternatively and without prejudice to what is stated in paragraphs 5 and 6 hereof, the Plaintiff avers that the First Defendant falsely and maliciously and without reasonable or probable cause, by procuring the Second Defendant to make a false affidavit as aforesaid on an application made on its behalf, caused and procured an order to be made by the Honourable Mr. Justice James Wicks on the 28th day of May, 1965 for the arrest of the Plaintiff and caused the Plaintiff to be arrested and detained pursuant to the said order as stated in paragraph 5 hereof.

8. On 4th June, 1965 the Plaintiff secured the rescission of the aforesaid order and an order for his release from arrest and discharge from his undertaking and for the return of his passport was made by the said Honourable Mr. Justice James Wicks."

It is not in dispute that at all material times the second defendant was acting as manager of the Mombasa branch of the first defendant in the course of his employment with and within the scope of his authority granted by the first defendant.

It is clear on the evidence that the plaintiff at the material time was no fly-by-night. He had interests in several travel agencies, viz. Fourways Travel Service (Africa) Ltd., Mombasa; Fourways Travel Service (Nairobi) Ltd., in Nairobi; Fourways Travel Service (Tanzania) Ltd. in Dar-es-Salaam; Fourways Travel Service (Mwanza) Ltd. in Mwanza; Fourways Travel Service (Zanzibar) Ltd. in Zanzibar; Fourways Travel Service (Uganda) Ltd. in Kampala; Fourways Travel Service (Jerusalem) Ltd. in Israel which operated until June 1967; Fourways Travel Service (India) Ltd. in Bombay. In all these companies the plaintiff owned a share of the capital. He was a partner in Fourways Accommodation Bureau which deals with land in Mombasa. All the travel agencies, except the one in Uganda, were members of I.A.T.A. and special agents for B.I. line and the Shipping Corporation of India. The Plaintiff was part owner of a house in Mombasa worth Shs 45,000/-. He had Shs. 60,000/- lying on deposit with the Bank of Baroda. In his affidavit sworn on June 2, 1965, the plaintiff disclosed his interest in the Fourways Travel Agencies of Nairobi, Mombasa, Dar-es-Salaam and Zanzibar as being worth Shs. 300,000/- and their solvency; that his yearly income from 1961 to 1964 varied between Shs. 60,000/- and Shs. 90,000/-; that his life was insured for Shs. 220,000/-. The plaintiff was clearly no man of straw. It is pertinent to observe that the plaintiff could have used the sum on deposit at the Bank of Baroda to settle the claim of the first defendant before leaving for India. The degree of prosperity of the Fourways Travel Agencies was not disclosed to the court; but it was the plaintiff's interest in the firm from which events giving rise to this suit stemmed. He had shares worth Shs. 10,000/- in the firm. It is clear on the evidence that the firm was not doing very well in 1965. There were disputes among the directors and the second defendant was becoming concerned about his Bank's security for monies owing to the Bank by firm. The Bank was having difficulty in getting the firm's vehicles transferred into the Bank's name. The second defendant was under pressure from his superiors to secure the Bank's position. The secretary to the firm had resigned and the firm's accounts had not been brought up-to-date. The general manager of the firm, Mr. Harrison, in a letter dated April 29, 1965, to the secretary of the firm, with a copy, inter alios, to the second defendant, had written that the firm's books must be completed and brought up-to-date before his resignation was accepted, adding:

> "The accounts are required urgently for Audit Purpose and by the C.I.D. Failing to do this may jeopardise your early departure to India."

On April 9, 1965, Messrs. Patel & Thakkar, advocates for the plaintiff, wrote to the firm with a copy to the Mombasa branch of the first defendant, tendering his resignation from the firm with effect from April 1, 1965, and withdrawing the guarantee given to the first defendant. On receipt of this letter the first defendant wrote in a letter dated April 12, 1965, to the plaintiff stating they accepted the plaintiff's letter of April 9, 1965, as notice of discontinuance of the plaintiff's guarantee but informed the plaintiff that he remained liable to the first defendant in respect of the amount owing by the firm as at the date on which the plaintiff's notice took effect. The first defendant added that Shs. 56,732/22 were owing as at close of business on April 9, 1965, "together with accrued interest and charges etc. We reserve our right to call on you personally to pay this amount subject to such adjustment which may be necessary in accordance with the terms of the guarantee in due course." On May 10, 1965, the first defendant wrote to the plaintiff as follows:

> "Reference is made to our letter to you dated the 12th April, 1965.
>
> In view of the fact that at the time of establishing the credit facilities in favour of Kilimanjaro Tours and Safaris Ltd., it was a condition of the advance that we should be provided with a continuing guarantee in our favour for Shs. 60,000/- to be signed jointly and severally by all six directors, you will appreciate that by our receipt of notice from you of your wish to terminate your guarantee, the conditions applicable to this credit facility are no longer fulfilled.
>
> In view of the preceding, we are obliged to inform you that the accounts kept by Kilimanjaro Tours and Safaris Ltd., in our books have been closed as at the date of receipt by us of your notice of discontinuance, i.e. the 9th April, 1965; a fresh current account has been opened as from that date, upon which future deposits and withdrawals will be allowed on condition that at no time will this new account show a debit balance. Furthermore, the aforementioned Company has been advised by us that we are entitled to debit to this fresh account the amounts required to execute the reimbursement programme laid down for the advance granted to this Company.
>
> We are also obliged to inform you that, in accordance with the terms of the guarantee signed by you, you remain liable to us jointly and severally in respect of the amount outstanding on the above Company's account in our books as at the close of business on the 9th April, 1965.
>
> These amounts are specified below:

Fluctuating overdraft account:	Shs.	23,398.2
Advance account:	Shs.	33,334.0
Accrued interest and charges on both accounts up to and including the 9th April, 1965:	Shs.	322.00
Total indebtedness = =	Shs.	57,054.2

> We now hereby formally request you to implement your guarantee, i.e. to pay to us the amount of Shs. 57,054.22 on or before the 31st May, 1965 in full settlement of the above Company's indebtedness to us, failing which we reserve our right to take further legal action against you under the terms of your guarantee.
>
> For the sake of good order and for your information, please find attached hereto copy of our today's letter to Kilimanjaro Tours and Safaris Ltd."

The plaintiff, therefore, was asked to implement his guarantee on or before May 31, 1965, by paying to the first defendant Shs. 57,054/22. On the same day the first defendant wrote to the firm with copies to all six guarantors requesting payment of Shs. 57,054/22 on or before May 31st, 1965. On May 19, 1965, Messrs. Patel & Thakkar wrote to the firm with copy to the first defendant as follows:

> "We have been instructed by our client Mr. L. J. Fernandes to advise you, and accordingly we do hereby advise you that he withdraws his resignation as tendered by our letter to you of the 9th April, 1965, as director.
>
> By a copy of this letter, Messrs. The Commercial Bank of Africa Limited are requested to continue his guarantee of the above-named company as from the date of this letter until further notice."

In the meantime the plaintiff had an interview with the second defendant. This occurred on May 18, 1965. At this interview the plaintiff endeavoured to retrieve the situation. The plaintiff put two propositions to the second defendant: that the bank should use its good offices to persuade the other directors to hand over the firm to the plaintiff and Mr. Kuldip Singh; and that the plaintiff would withdraw his withdrawal of guarantee if the bank were willing to continue facilities to the firm. The second defendant apparently told the plaintiff that it was no part of the bank's job to act on his behalf vis-a-vis the other directors and that if he wished to pursue the matter of resuscitating his guarantee he should put the proposal in writing when the second defendant would refer it to his superiors. The second defendant said in evidence that he told the plaintiff that he did not consider it likely that the bank would change its mind. The proposal appears to have been put in Messrs. Patel & Thakkar's letter of May 19. Towards the end of May 1965 events gathered momentum. On May 26, 1965, Mr. Bowyer received a telegram from Mr. Rynveld, another director of the firm, the text of which read:

> "For Bowyer. Understand Fernandes intending to fly India thirtieth. Return unknown. Regards. Rynveld."

The motive behind the sending of this telegram is not known but since a dispute existed between the plaintiff and Rynveld, a fact known to Mr. Bowyer, the motive may not have been entirely free from malice. On receipt of this telegram Mr. Bowyer got in touch with the second defendant. As a result a letter dated May 26, 1965, was dispatched to the plaintiff with copies to the firm, the five other directors of the firm, Messrs. Patel & Thakkar and Messrs. Bryson & Bowyer. This letter read as follows:

> "We have received a copy of Messrs. Patel and Thakkar's letter dated the 19th May, 1965 addressed on your behalf to the above company, copy to ourselves, and note the request contained in its final paragraph.
>
> We do not consider that, having given notice of discontinuance of your guarantee, you are competent in this or any other manner to withdraw such notice. In any event we would not in all the circumstances of the matter be prepared to entertain any such approach by you.
>
> We regret therefore that we have no alternative but reiterate our demand that your personal indebtedness under guarantee be satisfied by the immediate payment to us of the sum of Shs. 57,054.22 stated in our letter of the 10th May, 1965.
>
> Unless this payment is made to us by close of business tomorrow the 27th May, 1965, proceedings for recovery thereof (together with Court fees, legal expenses, etc.) and such further or ancillary proceedings as we

> may be advised as being requisite to protect our position, will be instituted against you forthwith.
>
> By copy of this letter our advocates, Messrs. Bryson & Bowyer of Mombasa, are instructed to file such proceedings on the morning of the 28th May, 1965 unless previously advised by us that the required payment has been received."

This letter was sent by registered post to the plaintiff and a further copy was sent to plaintiff by hand on May 27, 1965. Messrs. Patel & Thakkar received their copy on May 27, 1965, at 10.45 a.m. The Bank's delivery book shows an entry of a letter to the plaintiff on May 27, 1965, and some initials of the receiver. The plaintiff says he never received this letter until he returned to Mombasa on May 30, 1965, after his arrest. The bank had brought forward the day of settlement by four days due to the plaintiff's impending departure for India.

So much for the facts. Let us now pass to the law for a moment or two. What the plaintiff is alleging is that the two defendants maliciously abused civil proceedings. Paragraph 717 of Vol. 25 of Halsbury's Laws of England (3rd Edn.) states this:

> "*Remedy analogous to an action for malicious prosecution*. The law allows every person to employ its process for the purpose of asserting his rights without subjecting him to any liability other than the liability to pay the costs of the proceedings if unsuccessful. In civil proceedings, however, which involve an interference with liberty or property, or affect, or are likely to affect, reputation, an action lies analogous to the action for malicious prosecution, if those proceedings are undertaken maliciously and without reasonable and probable cause."

When taking advantage of O. 38, r. 1, therefore, the plaintiff, to succeed in this suit, has to show that the second defendant was doing so maliciously and without reasonable and probable cause. What is malice in this context? In Clerk & Lindsell on Torts (12th Edn.) at paragraph 70 there is the following:

> "*Malicious prosecution*. In the tort of malicious prosecution malice must be shown as an additional requirement of proof separate from absence of reasonable and probable cause. 'The term "malice" in this form of action is not to be considered in the sense of spite or hatred . . . but . . . actuated by improper and indirect motives.' And mere anger at the plaintiff is not malice, because this is natural and proper where he was believed to have committed a crime."

At paragraph 1725, op. cit., there is this:

> "*Improper motives*. 'The term "malice" in this form of action is not to be considered in the sense of spite or hatred against an individual, but of malus animus, and as denoting that the party is actuated by improper and indirect motives.' "

In Mulla on the Code of Civil Procedure (1908) (13th Edn.), Vol. II, at page 1499 there is the following in the commentary on O. 35, r. 1 which is in terms similar to O. 38, r. 1 of our Rules:

> " '*Reasonable probability*'. – Where the defendant is about to leave India, it is not necessary to prove any 'intent' on his part to obstruct or delay the execution of any decree that may be passed against him. It is enough if the circumstances under which he is about to leave India afford a 'reasonable probability' that any decree that may be passed against him in the suit will thereby be obstructed or delayed in execution. The Court must be

> satisfied on two points (1) that the plaintiff has a cause of action which is *prima facie* unimpeachable, subject to his proving the allegations in his plaint and (2) that the Court should have reason to believe on adequate materials that unless jurisdiction is exercised there is real danger that the defendant will remove himself from the ambit of the powers of the Court."

I have asked myself the question many times since hearing the evidence in this case – did the second defendant act with improper motives? He acted, he said in evidence, to protect the interests of the bank. How can that be said to be in any way improper? I have no reason to doubt that his motive in setting in train the legal machinery for arresting the plaintiff was to protect the interests of the bank. I think there is a singular absence of malice here. The real question here is – did the second defendant have reasonable and probable cause for acting as he did?

It is said that the second defendant should have made inquiry before taking the extreme step of having the plaintiff arrested. The extent of the burden which lies on a creditor in this regard does not seem to be covered by authority. It must be remembered that the second defendant was advised by Mr. Bowyer to take the steps he did take. Then, on the other hand, it can be said, with some justification, that the plaintiff should have informed the second defendant of his impending departure to India. When the plaintiff left Mombasa for Nairobi on the first leg of his journey to India, as far as he was aware, fulfilment of his obligations under the guarantee was required by May 31, 1965. Yet he was booked to leave Kenya by air on May 30, 1965. Would it not have been prudent of the plaintiff to have settled the matter before his intended departure or, at least, informed the second defendant of his plans? It appears that his impending departure for India was no secret in Mombasa. From the affidavits sworn and filed in the proceedings following his arrest on May 30, 1965, it appears that six residents of Mombasa knew some time in May that the plaintiff was going to India at the end of that month and that the plaintiff had informed them he would be returning to Kenya after the lapse of a period varying from ten days to three weeks. These six residents included Mr. Cats of the General Bank of the Netherlands, Mombasa. However, the one resident in Mombasa who was deeply concerned with a monetary claim against the plaintiff was left in ignorance of the plaintiff's plans until informed by Mr. Bowyer who received the telegram from Mr. Rynveld.

Again we return to the question – what is reasonable and probable cause? In Clerk & Lindsell on Torts (12th Edn.) at paragraph 1712 we find the following:

> "*What is reasonable and probable cause*. As has been already seen, reasonable and probable cause depends upon the information and belief of the defendant. 'There must be a reasonable cause – such as would operate on the mind of a discreet man; there must be a probable cause – such as would operate on the mind of a reasonable man; at all events such as would operate on the mind of the party making the charge; otherwise there is no probable cause for him: I cannot say that the defendant acted on probable cause, if the state of facts was such as to have no effect on his mind.' (*Per* Tindal, C.J., *Broad v. Ham* (1839), 5 Bing. N.C. 722 at p. 725; *Turner v. Ambler* (1847), 10 Q.B. 252.)
>
> In *Herniman v. Smith*, [1938] A.C. 305, the House of Lords approved the definition of reasonable and probable cause by Hawkins, J., in *Hicks v. Faulkner* (1881), 8 Q.B.D. 167, at p. 171. 'An honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them

> to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.' "

Again in paragraph 1713, op. cit.:

> " 'The question of reasonable and probable cause depends in all cases not upon the actual existence, but upon the reasonable bona fide belief in the existence, of such a state of things as would amount to a justification of the course pursued in making the accusation complained of – no matter whether this belief arises out of the recollection and memory of the accuser or out of information furnished to him by others.' (*Per* Hawkins, J., in *Hicks v. Faulkner, supra*, at p. 173; *per* Lord Goddard, C.J., in *Tims v. John Lewis & Co., Ltd*., [1951] 2 K.B. 459, at p. 474 (reversed on another ground *John Lewis v. Tims*, [1952] A.C. 676 (H.L.).)
>
> On the other hand it would be obviously absurd to make a defendant liable because matters of which he was not aware put a different complexion upon facts which in themselves appeared a good cause of prosecution. But neglect to make reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also of malice. (See *Abrath v. North-Eastern Ry.* (1886), 11 App. Cas. 247)."

The fact that the second defendant took legal advice before acting would not per se justify his action. For if there be no reasonable and probable cause the mistaken opinion of a legal adviser cannot alter that fact. The fact that legal advice was taken, however, tends to show that the second defendant was acting honestly and therefore without malice.

Altering the words of Hawkins, J., in *Hicks v. Faulkner* defining reasonable and probable cause to suit the present context of abuse of civil process rather than malicious prosecution I think they could read as follows:

> "An honest belief based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which assuming them to be true would reasonably lead an ordinary prudent and cautious man placed in the position of the defendant to the conclusion that the plaintiff was about to leave Kenya under circumstances affording reasonable probability that the defendant will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the plaintiff in the suit."

Did the defendants pass this test? There was the background of the unsatisfactory state of affairs vis-a-vis the firm; pressure on the second defendant from his superiors to call in the debt owing by the firm; the letter of May 10, 1965, to the plaintiff calling for payment by May 31, 1965; the interview of May 18, 1965, when no progress seems to have been made and the status quo was preserved; the receipt of the dramatic telegram from Mr. Rynveld by Mr. Bowyer; consultation between Mr. Bowyer and the second defendant; information from the Night Security Organization that the plaintiff was booked to leave Kenya by air on May 30, 1965. Here, let it be said that the fact that the Night Security Organization do not appear to have informed Mr. Bowyer whether or not the plaintiff had a return ticket could have influenced Mr. Bowyer in giving the advice which he did give to the second defendant. However, even if the Night Security Organization had informed Mr. Bowyer that the plaintiff was in possession of a return ticket I think Mr. Bowyer's advice might well have been the same. Possession of a return ticket does not mean that the holder will make the return journey. Then there was the absence of any information given by the

plaintiff to the second defendant of the plaintiff's plans. All these facts seem to me to have provided the second defendant with reasons for the action he took. It might be thought that the fact that on June 4, 1965, Wicks, J., discharged the order nisi indicates an absence of reasonable and probable cause. On that occasion Mr. Inamdar was fighting a different cause. He was appearing on behalf of the plaintiff. He succeeded in obtaining the discharge of the order nisi on the ground that the affidavit in support of the application for the arrest of the plaintiff did not disclose facts indicating a reasonable probability of the damage, which was sought to be avoided, occurring. Paragraph 4 of the second defendant's affidavit merely states that the plaintiff was about to leave the Republic. Neither paragraph 4 or 5 of this affidavit states even that the plaintiff was leaving "under circumstances affording reasonable probability that . . . etc.". But the fact that the circumstances were not stated in this affidavit does not mean necessarily that the second defendant acted without reasonable and probable cause. The ruling of my brother Wicks merely indicates that insufficient grounds were given in the affidavits of the second defendant and Mr. Elliott to support the application. Hence he discharged the order nisi.

Should the second defendant have made more searching inquiries before taking the extreme step? Time was short. He did not get notice of the plaintiff's impending departure until May 26, 1965. The plaintiff intended to leave on May 30, 1965. Four days is not a great deal of time for inquiries to be made. The scope and extent of the inquiries made by the Night Security Organization were not disclosed in evidence. What motivated Mr. Bowyer and the second defendant was the fact that settlement had been demanded by May 31 and then May 27 and the plaintiff was due to leave Kenya by air on May 30.

As regards the obstruction or delay in the execution of any decree that might be passed as required by O. 38, r. 1 (*b*), I think here that delay or obstruction prior to the granting of the decree is irrelevant and that what is required is obstruction or delay after the decree has been passed. I hold this view because delaying the plaintiff or avoidance of process is dealt with in O. 38, r. 1 (*a*), albeit with intent on the part of the defendant being required. Moreover the words must be construed in their natural meaning and their natural meaning is that the obstruction or delay relates to that which will or may occur after the decree has been passed. I think it can be stated with some sense of reality that, had the plaintiff remained permanently, or even for a protracted period, outside Kenya, execution of any decree in favour of the first defendant against the plaintiff would be likely to have been obstructed or delayed. The decree in such circumstances could not have been executed, for example, by the plaintiff's committal to civil gaol. In my view the second defendant passed the test and both he and the first defendant acted without malice and with reasonable and probable cause.

I have some sympathy for the plaintiff, but I cannot but believe that to a large extent he was the author of his own misfortune in not informing the second defendant of his intentions or settling the matter before his intended departure. If I had held that the second defendant acted with malice and without reasonable and probable cause I would have awarded the plaintiff only nominal damages. He suffered no great indignity personally nor would knowledge of the event have been likely to be widespread. His image would not have suffered any great tarnish. However, in law, in my opinion, he has no cause of action.

In sum his suit is dismissed with costs and I certify for Queen's Counsel.

Suit dismissed.

For the plaintiff:
PS Talati

Talati & Talati, Mombasa

For the defendants:
JA Mackie-Robertson, QC and *IT Inamdar*
Bryson, Inamdar & Bowyer, Mombasa

Musisi v Republic
[1969] 1 EA 493 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	21 February 1969
Case Number:	28/1969 (75/69)
Before:	Mwendwa CJ and Trevelyan J
Sourced by:	LawAfrica

[1] Criminal Law – Jurisdiction – Post from one country to another – Forged invoices posted from Uganda – Whether Kenya court can convict accused of uttering invoices and attempting to obtain money by false pretences.

[2] Criminal Law – Obtaining by false pretences – Forged invoices posted in Uganda – Whether crime committed in Kenya.

[3] Criminal Law – Uttering – Forged invoices posted in Uganda – Whether "uttered" in Kenya – Penal Code (*Cap.* 62), *s.* 4 (*K.*).

Editor's Summary

The accused posted forged invoices in Uganda as part of a false claim on the Kenya Government, his employer. He was convicted in Kenya on charges of uttering the invoices and of attempting to obtain money by false pretences. On appeal he argued that the Kenya court had no jurisdiction.

Appeal dismissed.

Cases referred to in judgment:

(1) *R. v. Oliphant*, [1905] 2 K.B. 67.

(2) *R. v. Taylor* (1865), 4 F. & F. 511; 176 E.R. 668.

(3) *Des Raj Sharma v. Reg*. (1953), 20 E.A.C.A. 310.

(4) *R. v. Nillins* (1884), 53 L.J. (M.C.) 157.

(5) *R. v. Godfrey*, [1923] 1 K.B. 24.

(6) *R. v. Harden*, [1962] 1 All E.R. 286.

Judgment

Mwendwa CJ: read the following judgment of the Court: The appellant, an employee of the Kenya Government, went on a course to Uganda. Whilst there he made, and we have no doubt that he falsely made, upon his employer, a claim or claims for the alleged purchase of books. We use the expression "a claim or claims" because as we understand what we were told, and we can only trust that our understanding is correct, he claimed to have paid for books invoiced in the sums of Shs. 110/65 and Shs. 212/20 but sought to be given the sum of Shs. 400/- as an allowance, i.e. a general allowance for books.

The appellant transmitted, by means of the postal administration, two forged invoices – we do not doubt that they were forged – but they were detected upon arrival in Nairobi, as a consequence of which he got no money but was prosecuted instead. He was charged, here in Nairobi, with four counts, one each for uttering the two invoices and one each for attempting to obtain the sums thereof by false pretences.

In this appeal the appellant contends that his guilt was not established but we have no doubt that his dishonest conduct was proved well beyond reasonable doubt. This does not, however, dispose of the appeal; for he argues that as his claims were posted in Uganda, no court in Kenya has jurisdiction to try him.

A person who is himself in one country may, by the hands of an innocent

agent, commit a crime in another country though, of course, he cannot be tried till he comes there. Thus, where a man in Paris by false returns caused incorrect figures to be entered in the account books of a firm in London, it was held that the offence of false accounting was committed by him in London: *R. v. Oliphant*, [1905] 2 K.B. 67. We were referred to a passage in a textbook which says that nonetheless before jurisdiction can be arrogated it is necessary that either the direct results of the crime take place in that other country, or than an overt act there be committed. No authority for this proposition appears in the textbook but we do not think we need to go into this because at least the object of the appellant's fraud was to get the Kenya Government to act upon it in Kenya. In *R. v. Taylor* (1865), 4 F. & F. 511; 176 E.R. 668 it is reported that:

> "As to the forgery, that appeared to have been committed in France but there was evidence to go to the jury of uttering. If a person in a foreign country set other persons in motion as his agents, by whom the cheque was presented in England that is an uttering of which he might be convicted here. . . . And if the jury were satisfied that the prisoner presented the cheque in France, and caused it to be presented here, they should find him guilty."

The decision in this case was referred to and adopted in *Des Raj Sharma v. Reg*. (1953), 20 E.A.C.A. 310, where at page 315 we have:

> "Mr. Jamna Das's son could not recollect whether or not he received exhibit 1 from the appellant personally but that was immaterial if, as the learned Judge correctly held, it could be reasonably inferred . . . that if not received from the appellant personally, it must have been received from him through the post or through an agent. In such case the offence of uttering the cheque was committed in Kenya and it is immaterial whether the appellant was, at that time, within or without the Colony."

In R. v. Nillins (1884), 53 L.J. (M.C.) 157 the facts were that the accused in England wrote letters containing false pretences to persons in Germany inducing them to deliver certain goods to his order in Hamburg upon which it was held that there was no doubt that the crime had been committed in Germany. In *R. v. Godfrey*, [1923] 1 K.B. 24, at page 29, Lord Hewart, C.J., delivering the leading judgment said:

> "I do not differ in the smallest degree from the decision in *Reg. v. Nillins*."

In *R. v. Harden*, [1962] 1 All E.R. 286 the accused was convicted on charges of obtaining by false pretences. He was a director of an English company which sold goods on hire-purchase terms. To finance his company he made arrangements with a company registered in Jersey whereby he sent hire-purchase agreements by post in return for cheques posted by the company in Jersey. When sending the agreements he sent a letter of sale which *inter alia* said, "This offer may be accepted by you at any time within one month of the date hereof by sending your cheque for the net amount." The case for the prosecution was that some of the hire-purchase agreements were, as the accused well knew, fictitious. It was held that there was no single and universal rule deciding that a cheque transmitted by the victim through the post is to be treated as having been obtained by the accused at the moment of posting, but that it was clear that this would be the case if the accused had agreed with his victim that receipt by the postmaster should be equivalent to the receipt by himself. The court pointed out that the gist of the offence of obtaining by false pretences was the act of obtaining and that, as on the facts the receipt of the postmaster should be the receipt of the accused, the acting of posting by the company in Jersey completed the act of obtaining in that place. On pages 290 and 291 of the report there is this:

> "In the present case, the cheques did not come into the physical possession of the appellant until they were received by him in the post at Eastbourne, and counsel's submission must fail unless the postmaster can properly be regarded as the agent of the appellant for the purpose of accepting delivery of the cheques in Jersey."

Section 4 of the Penal Code defines the word "utter" to mean and include:

> "using or dealing with and attempting to use or deal with and attempting to induce any person to use, deal with, or act upon the thing in question."

It was here, in Nairobi, that the appellants sought to induce the Kenya Government to act upon the invoices, his innocent agents being the postal staff. We do not doubt also that it was here that he attempted to obtain money by his false pretences. But we will yet say a word or two about the charges.

We are of the opinion that it would have been better had it been kept in mind by all those concerned that when the appellant sent the invoices through to Nairobi he did so to get an allowance for books rather than money for particular invoices. If there had been no need to send the invoices forward the appellant would not, of course, have sent them so that the inference, we think, is that they were necessary for the obtaining of the Shs. 400/-. That it was the sum of Shs. 400/- which was sought is clear from the letter dated January 31, 1968. In this letter the appellant said that he had bought books and wanted a refund accordingly so that it may at any rate be argued that the two counts for attempting to obtain etc. were correctly laid. But it would, so it seems to us, have been preferable had there been but one uttering charge and one charge for attempting to obtain Shs. 400/- by a false pretence. However, the sentences were ordered to run concurrently with each other and we cannot see that the appellant has been prejudiced. In respect of the sentences, the magistrate said: "I would be failing in my duty if I do not impose a deterrent sentence." On our part we feel that such a sentence was not required for this first offender who foolishly succumbed to temptation and will lose so much for so little.

The appeal against conviction is dismissed but, the appellant having served about 3½ months imprisonment we reduce the sentences awarded on each count to such a period as will enable him to be released forthwith.

Order accordingly.

For the appellant:
DV Kapila
DV Kapila & Co, Nairobi

For the respondent:
S Sangale (State Counsel, Kenya)
Attorney-General, Kenya

Opoloto v Attorney-General of Uganda
[1969] 1 EA 496 (CAK)

Division: Court of Appeal at Kampala

Date of judgment: 24 April 1969

Case Number: 7/1968 (76/69)

Before: Duffus V-P, Spry and Law JJA

Sourced by: LawAfrica

(Reference to the full Court from a decision of Russell, J.)

[1] Appeal – Appeal out of time – Absence of advocate from Uganda while ill – Whether reason for extension of time for filing record of appeal – East African Court of Appeal Rules 1954, *r.* 9.

[2] Appeal – Court of Appeal for East Africa – Constitution of – Whether judges of High Court of Uganda judges of Court of Appeal.

[3] Constitutional Law – Constitution of Uganda – Court of Appeal – Whether Constitution applies to Court of Appeal for East Africa – Constitution of Uganda, art. 89 *– East African Community Act* 1967 (*No.* 28 *of* 1967) (*U.*).

[4] Constitutional Law – Constitution of Uganda – Interpretation – Whether Court of Appeal may interpret Constitution – Constitution of Uganda, art. 87 *– Judicature Act* 1967 (*No.* 11 *of* 1967), *s.* 41 (*U.*).

Editor's Summary

The advocate for the applicant gave notice of appeal and applied for a copy of the record within one week of the delivery of the judgment of the High Court of Uganda. The copy of the record was ready at the beginning of August and the record of appeal could have been filed in time, but on August 1 the advocate for the applicant had to go to England for medical treatment and on his return time had expired. The applicant applied to a judge of the High Court for leave to file his record of appeal out of time. The judge dismissed the application on the ground that the judges of the High Court of Uganda were no longer ex officio judges of the Court of Appeal for East Africa. The applicant referred the application to the full court.

Held –

(i) the interpretation of the Constitution required was not sufficiently important to the reference to require a reference to the High Court;

(ii) article 89 (5) of the Constitution of Uganda applies only to a Court of Appeal to be established under art. 89, and not to the existing Court of Appeal for East Africa;

(iii) accordingly the judges of the High Court of Uganda remain judges of the Court of Appeal for East Africa;

(iv) sufficient reason had been shown for allowing the record of appeal to be filed out of time.

Reference allowed.

Cases referred to in judgment:

(1) *Ongyetho and others v. Riji and West Nile District Administration* (Uganda High Court Application No. KAM 8 of 1968) (unreported).

(2) *Otoi v. Uganda* (Uganda High Court Criminal Appeal No. 163 of 1967) (unreported).

Judgment

The following considered judgment of the Court was read

on behalf of **Duffus V-P:** This is an application by the plaintiff in Civil Suit No. 20 of 1967 in the High Court of Uganda for leave to file the record of appeal out of time. The application was made under r. 9 of the Eastern Africa Court of Appeal Rules 1954, and came before Russell, J., a judge of the High Court of Uganda, in his ex officio capacity as a judge of the Court of Appeal for East Africa. The judge dismissed the application on the ground that he had no jurisdiction to deal with the matter holding that the judges of the High Court of Uganda were no longer ex officio judges of the Court of Appeal for East Africa.

This matter now comes before us by virtue of the provisions of r. 19 (6) of the Rules. Mr. Kiwanuka, advocate for the plaintiff/applicant, brought this matter before the court by a document headed "Notice of Appeal" but clearly he was aggrieved by the decision of Russell, J., and desired to have his application determined by a reference to the full court in accordance with provisions of sub-s. (6) of r. 19 and this Court has dealt with the application on that basis. The issue whether a judge of the High Court of Uganda is still an ex officio judge of the Court of Appeal for East Africa depends on the interpretation given to art. 89 of the Constitution of Uganda. Russell, J., held that as a judge of the High Court of Uganda he was not by virtue of the provisions of the Constitution still an ex officio judge of the Court of Appeal for East Africa and he fully set out his reasons for so holding in *Ongyetho and others v. Riji and West Nile District Administration* (Civil Application No. KAM 8 of 1968) (unreported). In this ruling after referring to r. 9 (1) as the relevant rule giving the court power to extend time he said:

> "The reference to 'the Court' appears to me to be a reference to the Court of Appeal and an order for extension of time may be made by that Court or a judge thereof. Article 6 of the Eastern Africa Court of Appeal Order-in-Council 1950 reads:
>
> > 'The judges of the Court shall consist of a President, a Vice-President, one or more Justices of Appeal, and the Judges of the Superior Courts of the Territories'
>
> but that Order-in-Council has been revoked and the constitution of the Court and the appointment of the President, Vice-President and judges was transferred firstly to the East African Common Services and more recently to the East African Community.
>
> Article 89 (5) of the present Uganda Constitution provides that Parliament may provide that the Chief Justice may be a member of the Court of Appeal established under that article. Although the 'Court of Appeal established under this section' refers to a Uganda Court of Appeal the section is indicative of the fact that the puisne judges of the High Court of Uganda are no longer ex officio members of the Court of Appeal for East Africa.
>
> I am strengthened in this view by Section 37 (1) of the Judicature Act 1967 which empowers this court to extend the time:
>
> (*a*) for giving notice of intention to appeal, or
>
> (*b*) for making an application for leave to appeal, or
>
> (*c*) for a certificate that the case is fit for appeal.
>
> An extension of time for filing the record of appeal is not within the enabling terms of that section and on these grounds alone I feel compelled to decline to make the order prayed for. The appellant should make his application to the Court of Appeal or a judge thereof and I trust that in dealing with the application the Court of Appeal will clarify the position."

We agree with the judge that the interpretation of art. 89 of the Constitution is a matter of difficulty and apparently one that has given rise to considerable

differences of opinion both at the Bar and on the Bench in Uganda. This is illustrated by the fact that when this matter was argued before the learned judge on November 9, 1968, Mr. Matovu appearing for the Attorney General then submitted that sub-ss. (3) and (6) of art. 89 applied and that the judges of the High Court of Uganda were no longer ex officio judges of the Court of Appeal for East Africa, but by the time that the matter came before us for argument the Law Officers for the State had apparently changed their view, as Mr. Matovu now supported the applicant's case and submitted that the judges of the High Court were still ex officio judges of the Court of Appeal for East Africa. It is of interest that the learned judge at the hearing on November 9 also found substance in Mr. Kiwanuka's further arguments for the applicant but held that having already made an order in open court holding that he was not an ex officio judge of the Court of Appeal, he had no jurisdiction at that stage to amend or alter his order.

The Court of Appeal for East Africa is at present established by the Court of Appeal for Eastern Africa Act 1962 (Act No. 13 of 1962 of the East African Community). Section 3 of this Act provides for the Constitution of the Court and the relevant portions state:

> "(1) There shall be a Court of Appeal for the Partner States which shall be styled the Court of Appeal for Eastern Africa.
>
> (2) Subject to the provision of section 5 of this Act, the Judges of the Court shall be –
>
> (*a*) a President, a Vice-President and such number of Justices of Appeal as may be determined by the Authority, who shall be appointed by the Authority; and
>
> (*b*) the Chief Justice and the other Judges of the High Court of each Partner States, who shall be members of the Court ex officio.
>
> (4) The persons who, immediately before the date of the coming into operation of this Act, held the offices of President, Vice-President and Justices of Appeal of the existing Court shall be deemed to have been respectively appointed at the date of the coming into operation of this Act, and in accordance with its provisions, to be the President, the Vice-President and Justices of Appeal of the Court constituted by this Act and shall be, from such date, in the service of the Organization."

By the Treaty for East African Co-operation entered into by the Governments of the three partner states and which came into force on December 1, 1967, it was agreed as follows:

> "CHAPTER XX – THE COURT OF APPEAL FOR EAST AFRICA
>
> Article 80
>
> *The Court of Appeal for East Africa.*
>
> There shall be a Court of Appeal for East Africa which shall be constituted in such manner as may be provided by Act of the Community, and the Court of Appeal for Eastern Africa established by the East African Common Services Organization Agreements 1961 to 1966 shall continue in being under the name of the Court of Appeal for East Africa and shall be deemed to have been established by this Treaty, notwithstanding the abrogation of those Agreements by this Treaty.
>
> Article 81
>
> *Jurisdiction of the Court of Appeal.*
>
> The Court of Appeal for East Africa shall have jurisdiction to hear and

> determine such appeals from the courts of each Partner State as may be provided for by any law in force in that Partner State and shall have such powers in connection with appeals as may be so provided."

Each of the partner states then enacted legislation giving effect to certain provisions of the Treaty. In Tanzania this was done by the Treaty for East African Co-operation (Implementation) Act 1967 (No. 42 of 1967), in Kenya by the Treaty for East African Co-operation Act 1967 (No. 31 of 1967) and in Uganda by the East African Community Act 1967 (No. 28 of 1967). Both in Tanzania and in Kenya special provision was made in their respective Acts providing for the Court of Appeal. Section 17 (1) of the Tanzania Act reads as follows:

> "The Court of Appeal for Eastern Africa established by the East African Common Services Organization Agreements, 1961 to 1966 and the Court of Appeal for Eastern Africa Act 1962 shall continue in being under the name of the Court of Appeal for East Africa and shall be deemed to have been established by the Treaty, notwithstanding the abrogation of those Agreements by the Treaty."

Section 17 of the Kenya Act is an exactly similar provision but no provision was made in the Uganda Act for the Court of Appeal. This was done by the Constitution of the Republic of Uganda which came into force on September 8, 1967, and art. 89 of the Constitution provides:

> "(1) An appeal shall lie to the Court of Appeal from any such final decision of the High Court of Uganda, other than any decision on any question as to the interpretation of this Constitution, as Parliament may prescribe.
>
> (2) No appeal shall lie from the Court of Appeal or, except as provided by this article, from the High Court of Uganda.
>
> (3) The High Court of Uganda and the Court of Appeal shall hear and determine any appeal pending before them at the date of the coming into force of this Constitution, but no other court or tribunal shall hear or determine any appeal then pending against any decision of the High Court of Uganda or the Court of Appeal.
>
> (4) The provisions of articles 83 to 86 inclusive, which apply to puisne judges, shall apply to judges of the Court of Appeal established by Parliament under this article, save that Parliament may prescribe the number of such judges and may provide that one of such judges shall preside.
>
> (5) Parliament may provide that the Chief Justice may be a member of the Court of Appeal established under this article.
>
> (6) In this article 'the Court of Appeal' means such court of appeal as may be established by Parliament and until such court of appeal is established it means the Court of Appeal for Eastern Africa.
>
> (7) This article shall be subject to clause (3) of article 51."

The definition of Court of Appeal in art. 130 of the Constitution reads:

> "'Court of Appeal' has the meaning assigned to it by clause (6) of article 89."

We would here refer to the provisions of the Judicature Act, No. 11 of 1967 of Uganda. This Act provides by s. 1 that the courts of judicature shall be (*a*) the High Court as established by the Constitution and (*b*) the Court of Appeal. Section 49 of the Act as amended by the Acts (Amendment) Order 1968, S.I. 84 of 1968, defines the Court of Appeal as follows:

> "'Court of Appeal' means the Court of Appeal for East Africa established by the Court of Appeal for Eastern Africa Act, 1962, as amended by the Treaty for East African Co-operation (Implementation) (Adoption of Laws) Order, 1967."

We have already referred to the Court of Appeal for Eastern Africa Act 1962 and the amendment by the Treaty implementation order referred to above (Legal Notice No. 1 of 1967) changes the name from "The Court of Appeal for Eastern Africa" to that of "The Court of Appeal for East Africa". The Court of Appeal for East Africa then is a statutory body established by the Court of Appeal for Eastern Africa Act 1962 (Act No. 13 of 1962 of the Community Acts) but its jurisdiction to act in each of the three Partner States is that given by the legislation of each of the individual states.

In Uganda jurisdiction is given by the Constitution and subject to the Constitution by the Judicature Act 1967 (Act No. 11 of 1967 of Uganda) which Act also provides for the practice and procedure of the court in Uganda.

The question therefore as to whether a judge of the High Court of Uganda is still an ex officio judge of this Court depends on the meaning of art. 89 of the Constitution of Uganda. We have in this respect considered whether we can determine this question in view of the restrictions placed on the jurisdiction of this Court in interpreting the provisions of the Constitution of Uganda and in particular we refer here to art. 87 of the Constitution and s. 41 of the Judicature Act 1967 (Act No. 11 of 1967). This question was considered and fully dealt with by this Court in *Otoi v. Uganda* (Criminal Appeal No. 163 of 1967) (unreported), and we would refer to this judgment. In the application now before the Court, the issue is to determine whether to grant the applicant an extension of time in which to file his record of appeal, and if the judge of the High Court who dealt with this matter was not an ex officio judge of this Court, then the application would still be outstanding and have to be dealt with by a judge of this Court. In any event, therefore, this would appear to us to come within the purview of the proviso to art. 87 (1) of the Constitution and to be a question not sufficiently important to these proceedings to require a reference to the High Court.

Article 89 provides that there shall be a Court of Appeal in Uganda to whom appeals shall lie from any final decision of the High Court, as Parliament may prescribe, and, according to sub-s. (6), "Court of Appeal" as used in art. 89 means –

> "such court of appeal as may be established by Parliament and until such court of appeal is established it means the Court of Appeal for Eastern Africa."

Here clearly the Constitution is distinguishing between a Court of Appeal to be established by act of Parliament in Uganda and the existing Court of Appeal for East Africa. The reference in sub-s. (6) to the Court of Appeal for Eastern Africa can only mean this Court, that is, the Court of Appeal for East Africa as established by the Court of Appeal Act 1962 (Act No. 13 of 1962 of the Community Acts). The difficulty in this case arises from the interpretation of sub-s. (5) which states that Parliament may provide that the Chief Justice may be a member of the Court of Appeal established under art. 89. If sub-s. (5) means that only the Chief Justice of all the judges in Uganda may be a member of this Court, that is, of Court of Appeal for East Africa, then we agree that by implication this must mean that in so far as Uganda is concerned the constitution of Uganda abrogates the provisions of s. 3 of the Court of Appeal Act 1962 (Act No. 13 of 1962 of the Community Acts) which makes the Chief Justice and judges of the High Court of Uganda ex officio judges of this Court. With

respect though to this view, it appears to us quite definitely to have been the intention of the Constituent Assembly who resolved the Constitution of Uganda to differentiate in art. 89 between a Court of Appeal that may be established in Uganda by Parliament in the future and the present existing Court of Appeal which is the Court of Appeal for East Africa, and that it was intended that the provisions of sub-s. (4) and (5) of art. 89 would only apply to any future Court of Appeal that may be established in Uganda by the Parliament of Uganda. We agree that the provisions of art. 89 are not altogether clear; thus no clear and definite provision is made for Parliament to establish a Court of Appeal for Uganda, although this may not have been thought necessary having regard to the general powers of Parliament to make laws. There can however be no doubt that Parliament has power under the Constitution to establish a Court of Appeal for Uganda and until that is done the Court of Appeal for East Africa is the Court of Appeal in Uganda.

It is, in our view, only when Parliament establishes Uganda's own Court of Appeal that the provisions of sub-s. (4) and sub-s. (5) of art. 89 apply. In this respect, sub-s. (4) would apply the provisions of art. 83 to 86 to the judges of the new Court of Appeal. Thus art. 83 would enable Parliament to provide for the number of judges in the appeal court, art. 84 would provide for their appointment and qualifications, art. 85 for their tenure of office and art. 86 for the oaths to be taken by the judges. All these provisions clearly could only apply to a judge appointed in Uganda for a court of that country and definitely could not, in our view, apply to this Court established by an Act of the Community for all three partner states.

Similarly sub-s. (5) can only be applied when Parliament establishes the new Court of Appeal for Uganda, and we agree that this section would then prevent Parliament making provisions for any of the judges of the High Court other than the Chief Justice to be a member of the Court of Appeal thus established.

The learned judge in the ruling that we have already referred to agreed that sub-s. (5) could only apply to a new Court of Appeal to be established by Parliament and not to the existing Court of Appeal, but we cannot agree with him that this is indicative of the fact that the Constitution intended that the High Court judges of Uganda would no longer be ex officio judges of the Court of Appeal for East Africa. Article 89, as we have stated, clearly distinguishes between any new Court of Appeal that may be established by Parliament in Uganda and the existing Court of Appeal for East Africa, and makes no attempt to interfere with the existing constitution and establishment of the Court of Appeal for East Africa.

The learned judge also referred to s. 37 (1) of the Judicature Act 1967 (Act No. 11 of 1967 of Uganda). This section gives the High Court power to extend the time for giving notice for intention to appeal or for making an application for leave to appeal or for a certificate that a case is fit for appeal. This section only applies to the extension of time before an appeal has actually come to this Court. We cannot see how this section could in any way affect the provisions making a judge of the High Court of Uganda an ex officio judge of Court of Appeal for East Africa.

We are therefore of the opinion that art. 89 does not in any way interfere with the constitution and establishment of the Court of Appeal for East Africa and that the Chief Justice and the judges of the High Court of Uganda remain ex officio judges of this Court.

The learned judge of the High Court was therefore wrong in holding that he had no jurisdiction to deal with this application, and this Court will now have to determine the application. It is however, greatly to be regretted that the provisions of the Constitution and legislation of Uganda in relation to the

jurisdiction and membership of the highest and final Court of Appeal for Uganda should be couched in such ambiguous, obscure and in some respects contradictory language. We would suggest that these provisions be urgently re-examined with a view to their clarification.

As regards the merits of this application, notice of appeal was given within a week of the delivery of judgment and a copy of the record ordered. This copy was ready at the beginning of August, and the record of appeal could have been filed in time, but Mr. Kiwanuka had to go to England for medical treatment on August 1. By the time he returned, at the end of August, time for lodging the record of appeal had expired. The judge was satisfied that in these circumstances there was sufficient reason to extend time for lodging the record, and we have come to the same conclusion. We accordingly allow the application and grant the applicant 14 days from the date of delivery of this judgment in which to lodge the record of appeal. In all the circumstances of this application we make no order as to costs.

Application allowed.

For the applicant:
BKM Kiwanuka
Kiwanuka & Co, Kampala

For the respondent:
MB Matovu (State Attorney, Uganda)
Attorney-General, Uganda

Kimani v Attorney-General
[1969] 1 EA 502 (CAEA)

Division:	Court of Appeal for East Africa at Nairobi
Date of judgment:	7 May 1969
Case Number:	6/1969 (77/69)
Before:	Sir Charles Newbold P, Duffus V-P and Spry JA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Trevelyan, J

[1] Civil Practice and Procedure – Interest – When to be awarded for period prior to filing of suit.

[2] Civil Practice and Procedure – Pleading – Special damage – Loss of profits on specific article – Whether special damage.

[3] Damages – Loss of land – Interest – Whether interest should be awarded from date of loss.

[4] Damages – Tort – Loss of land – Damages of value of land awarded – Whether profits subsequent to date of loss can be awarded as damages.

[5] Tort – Damages – Loss of land – Damages of value of land awarded – Whether profits subsequent to date of loss can be awarded as damages.

Editor's Summary

The respondent sued the appellant in the High Court in tort for damages for the loss of his land. The trial judge awarded the respondent damages of the value of the land at the date of dispossession together with a figure for loss of annual profits subsequent to the date of dispossession. The appellant appealed against the award of the latter figure.

Held –

(i) the respondent should not have been awarded both the value of the land at the date of its loss and damages for loss of its use thereafter;

(ii) since the respondent did not receive the value of the land on dispossession,

he should be awarded interest at 8% p.a. from the date of dispossession until judgment;

(iii) a specific loss of profits consequent upon the loss of use of an article for a specific period prior to the date of the plaint is special damage which must be pleaded and proved.

Appeal allowed. Order for interest substituted.

[**Editorial note:** The proceedings in the High Court were reported at [1969] E.A. 29.]

Cases referred to in judgment:

(1) *Ilanga v. Manyema*, [1961] E.A. 705.

May 7, 1969. The following ex tempore judgments were delivered:

Judgment

Sir Charles Newbold P: The facts relating to this appeal, so far as they are relevant to the issues raised on the appeal, are very simple. They are as follows. At some time which is not very clear but which, apparently, has been accepted by the parties as the year 1959, the Government, through persons for whom it had accepted responsibility and by action which it is unnecessary to describe in detail, dispossessed the plaintiff of land to which he was entitled. The plaintiff, after taking various other proceedings which are irrelevant for this purpose, eventually brought an action in tort claiming from the Attorney-General as the representative of the Kenya Government special damages and general damages. The special damages which he claimed consisted of the value of the land and certain legal costs.

The trial judge, having held that the plaintiff was entitled to recover damages for the dispossession of the land, awarded him damages equal to the value of the land of which he had been dispossessed, basing that value upon the 1959 value.

The judge stated that the 1959 value appeared to be accepted by both parties as the correct basis for working out the claim for loss, though he observed that the year 1961 had been referred to in the plaint. That figure, that is the figure for the value of the land at that date, came to a sum of Shs. 25,640/-; and that figure is no longer in dispute. He also awarded a further item of damages amounting to Shs. 30,000/-, of which he said the following in his judgment:

> "The item for 'general damages' is analogous, as I believe, to an action for mesne profits, but I cannot believe it right to make an award based on the period from 1959 to date for had the proper proceedings been instituted in 1963 an award could then have been made. But I am prepared to accept the figure of Shs. 6,500/- for annual loss of profits and I award Shs. 30,000/- under this head."

It is this item which is the subject of this appeal.

Mr. Shields, on behalf of the appellant, has submitted that the trial judge was wrong in giving any award under the head of loss of profits or mesne profits because the trial judge had already given to the plaintiff a sum equivalent to the full market value of the land. Mr. Shields also objects that if any sum were to be given in relation to any alleged loss of profits then that sum should have been specifically claimed as special damages and specified accordingly in the plaint and that no such claim for special damages had been made in the plaint. Another point, which I consider really subsidiary, was that Mr. Shields also submitted that in any event the period for which this loss of profits had been given was too

long in the circumstances of the case.

On the main point, that is whether the judge was correct in law in giving any sum by way of damages for loss of profits or for mesne profits in respect of a period subsequent to the date at which he had assessed the market value of the land and given judgment for that market value, Mr. Bhandari has submitted that, while normally where the full market value is given for an article the owner of the article would not subsequently be entitled to claim for any other damages, in the circumstances of this case the judge was correct in making the award. I had a little difficulty in determining the precise terms of Mr. Bhandari's submission. If I understood him correctly, he said that this award had been correctly made because the article in question was land and as the plaintiff did not receive the value of the land at the date of dispossession and as a consequence, and also as a result of his poverty, was unable to purchase any other land which he could have profitably utilised, the result is that he is entitled to damages equal to the loss of profits which he would have made from the land had he retained it as he should have done.

On the first main point we have had a number of authorities cited to us. Unfortunately none, with one exception, that is, *Ilanga v. Manyema*, [1961] E.A. 705, on a completely different matter, are decisions of East Africa. There are a number of decisions in East Africa as to the nature and measure of damages. Broadly, they are to this effect; that whether it be contract or whether it be tort damages are to be compensatory, save in exceptional circumstances. They are compensatory when they give back to the plaintiff what he has lost. In other words, the plaintiff – so far as money is concerned – is to be put in the position in which he was immediately prior to the wrongdoing which gave rise to his complaint. Now it seems to be accepted by the parties and by the trial judge that the date upon which the plaintiff was wrongly deprived of this land was 1959. I have doubts about that date, but in as much as the whole case up to now has been argued on that basis and there is no submission to the contrary, I shall base what I have to say in this judgment on the assumption that the plaintiff was deprived of his land in 1959. If that is so, bearing in mind the principles which I have already stated, what the plaintiff is entitled to in terms of money is to be put in the same position as he was immediately before he was deprived of his land. He has not claimed the return of the land but only damages; therefore this Court can deal with the matter only in terms of money. In those terms what the plaintiff was entitled to was the value of the land at that date. The judge has, in fact, given that figure and that figure is no longer in dispute and is not an issue before us. Having received the value of the land, that is the value of the article of which he was wrongly deprived, is the plaintiff entitled to anything more? In my view clearly not. The value in terms of money of any article, whether it be land or not, includes inherently an element related to the profitable use of the article in the future. Thus the plaintiff obviously cannot recover the value of the land and at the same time damages for the loss of the profitable use in the future of that land which he no longer possesses. That would seem to be a perfectly simple matter and I have no doubt whatsoever that it is in accordance with the law as enunciated, not only in this Court but in the courts of England according to the authorities to which we have been referred. I have therefore no doubt whatsoever that the trial judge was wrong in law in giving anything other than the value of the land. It is obvious, however, that the plaintiff should have received that value as at the date of dispossession. He did not, and his failure to receive the compensatory damages on that date is normally met by the award of interest on that figure. It appears that the plaint in this case did not claim interest but it also appears that the judge amended the proceedings in a manner which would allow a claim for interest to be made, though he restricted the interest awarded to that arising from the date of the judgment. It is not clear to me why he did so. I think that having amended, or allowed the amendment of, the plaint to enable a claim for interest to be made, he should

have made the award for interest as from the date on which the plaintiff was dispossessed of his land. As I have said, it is not clear what that date is, though it is accepted as 1959. I think that in broad figures one would take the date as July 1, 1959 – that is the middle of the year – since a specific date is necessary for the purpose of calculation of the interest. Accordingly, as far as this claim is concerned I would allow interest on the figure of the value of the land as awarded by the trial judge from July 1, 1959, up to the date of judgment at the normal rate, which I believe is 8%, and thereafter at court rates until payment in full.

That disposes of the appeal but in as much as argument has been made as to whether this claim for loss of profits should have been claimed as special damages I think I might just add these words. A claim of this nature is clearly "special damages", though I would agree with Mr. Bhandari that in certain circumstances loss of profits could be included within a claim for general damages. This claim, however, relates to a specific loss of profits consequent on the loss of use of the article for a specific period prior to the date of the plaint. That, in my view, is clearly special damages which, according to the decisions of this Court, must be pleaded and proved. The reason for this rule is, as pointed out by Mr. Shields, that a defendant must be given an opportunity of knowing precisely what specific claims are made and thus be in a position to call evidence to show that the claim in respect of the details is not correct. I need say nothing more on this matter because really it would be purely obiter having regard to my judgment on the main ground.

Accordingly I would allow the appeal and vary the judgment and decree by deleting from them any sum related to the award for loss of profits. That is, I would delete from the decree the figure of Shs. 30,000/- together with any interest to be calculated upon it and I would substitute for the judgment and decree an award of Shs. 25,640/- together with interest thereon at 8% from July 1st, 1959, until the date of judgment, thereafter interest on that sum at 6% until payment in full. I would not alter the judgment or decree in other respects.

I should like to make it clear that while I have specified July 1, 1959, I do not think that this is the correct date; but everyone seems to have accepted 1959 as being the material year and it is merely my choice of the middle of the year. My brother, Spry, J.A., has just pointed out that December 1959 is mentioned in the plaint and, as I have said earlier, the plaint also referred to 1961. It may be that in fact this date is completely wrong but it does not seem to have been challenged and the trial judge in his judgment made his award on the basis of the value of the land in 1959.

Duffus V-P: This is a case in which the plaintiff/respondent has been completely deprived both of ownership and possession of the land. The correct measure of damage, would in my view, be the value of the land at the date of his wrongful deprivation. The trial judge correctly assessed this value at Shs. 25,640/- but then he went on to allow this further sum of Shs. 30,000/- now the subject of this appeal. He allowed this amount for loss of annual profits as from 1959 to 1963. In my view this would correctly apply to an action for recovery of the possession of the land where the plaintiff still retains ownership but not to a case such as is the position here where the plaintiff has completely lost not only possession, but also where his entitlement to the land has been completely and irrevocably extinguished. The plaintiff was therefore no longer the owner of this land and had no further claim either to ownership or possession of the land. I am therefore of the view that it would not be proper to allow him to recover annual profits by way of general damages. The plaintiff should, however, recover interest on the amount of the value of the land as from

the date that he lost it up to the date of the judgment. I agree that this interest should be calculated at 8%.

I therefore agree that this appeal should be allowed in accordance with the judgment of my lord President.

Spry JA: I agree with the judgments which have just been delivered and with the proposed order. I am inclined to think that the date from which interest should commence to run should have been the end of 1959 but in view of the uncertainty of the record I am not prepared to disagree with my brethren on this point.

I would add only two observations. First, I think that if the respondent was entitled to any sum as actual loss between the date of dispossession and the date when the suit was filed, over the above the value of the land and interest on that amount, it should have been pleaded as special damage and I think, with respect, that although the learned judge purported to deal with the claim as general damage, his finding was one more appropriate to special damage. Secondly, I would observe that the application made to the learned judge for amendment to allow interest was most unsatisfactory in that it did not define the exact amendment which was sought.

Appeal allowed with costs.

For the appellant:
JF Shields (State Counsel, Kenya)

For the respondent:
MK Bhandari
Bhandari & Bhandari, Nairobi

Fernandes v Noronha
[1969] 1 EA 506 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	30 May 1969
Case Number:	52/1968 (78/69)
Before:	Sir Charles Newbold P, Duffus V-P and Law JA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Trevelyan, J

[1] Civil Practice and Procedure – Visit to locus in quo – Notes to be made by judge.

[2] Evidence – Further examination or cross-examination – Discretion – Principles – Evidence Act (*Cap*. 80), *s*. 146 (4) – *Civil Procedure* (*Revised*) *Rules* 1948, *O*. 17, *r*. 12 (*K*.).

[3] Negligence – Collision – Crossing main road – Motorist emerging from side entrance into main road – Duty owed to vehicle on main road.

[4] Negligence – Contributory negligence – Smooth tyre and loss of control of motor-cycle – Motor-cyclist partially to blame for collision.

Editor's Summary

The appellant was proceeding along the main road on his motor cycle at a fair speed. There was no other traffic on the road. The respondent, having seen the appellant some 200 yards away, drove his car from a side entrance onto the main road intending to drive across the road. After he got into the main road he stopped, by his own account because he then saw the motor-cycle coming very fast. The motor-cycle collided with the car and the appellant was injured. There was evidence that the rear tyre of the motor cycle was smooth and that the appellant lost control of the motor-cycle. The appellant having unsuccessfully

sued the respondent in the High Court then brought this appeal. One ground of appeal was whether the judge below should have allowed the respondent to be re-called after both the appellant's and the respondent's cases had been closed to enable him to be further cross-examined on a statement given by him to the police.

Held –

(i) the appellant, who was proceeding along the main road, had the right of way; and the respondent had to exercise a high degree of care in coming on to and going across the main road;

(ii) on the evidence, the appellant was not travelling at an excessive speed;

(iii) the respondent was 50% to blame for the accident;

(iv) the appellant was also negligent in the control of his motor cycle and was also 50% to blame;

(v) the discretion to re-call a witness for further examination or cross-examination should be exercised in exceptional cases where an injustice might otherwise result; in this case the judge was correct in not allowing further cross-examination.

Observations (per Duffus. V.-P.) as to procedure to be followed and notes to be made by a judge when visiting a locus in quo.

Appeal allowed. Responsibility for the accident apportioned as to 50% on each party. Case remitted to High Court.

Cases referred to in judgment:

(1) *Selle and another v. Associated Motor Boat Company Ltd. and others*, [1968] E.A. 123.

(2) *Abdul Hameed Saif v. Ali Mohammed Shotan* (1955), 22 E.A.C.A. 270.

30 May 1969. The following considered judgments were read:

Judgment

Duffus V-P: This is an appeal from the judgment of the High Court on a question of liability in a negligence action, resulting from an accident on November 24, 1965, in Nairobi along the main Limuru/Nairobi road. The admitted facts show that the plaintiff/appellant was riding a motor-cycle at about 7.20 a.m. proceeding along the main road in a direction leading away from the city centre whilst the defendant/respondent was driving his motor car from a side entrance on to the main road with the intention of proceeding towards the city centre. To do this he had to cross the white line dividing the main road into two traffic lanes and proceed directly across the appellant's pathway to get to the opposite side of the main road. It is also agreed that the respondent started to enter the main road with this intention and that it was after he had started this manoeuvre that the appellant had the accident which resulted in his being thrown from his motor-cycle ending up with his head against the respondent's car. It is further agreed that as a result of this accident he suffered grievous and very severe injuries. There is a dispute as to the position of and the movements of the two vehicles just prior to the accident. The incident happened early in the morning and there was no other traffic on the road at the time and apparently no one else saw the accident except the two parties themselves. The learned judge accepted

the defence and found that the respondent had not been negligent and that the accident was due solely to the appellant's negligence and accordingly he gave judgment for the respondent.

The appellant appealed to this court on some five various grounds but he also made a preliminary application on notice of motion to be allowed to adduce further evidence at the hearing of the appeal. He asked that a statement alleged to have been given by the respondent to the police on the day of the

accident be admitted in evidence. This statement had also been the subject of an application at the trial, where the appellant's advocate after both the plaintiff and the defendant's cases had closed, but before addresses or judgment, applied for the defendant to be recalled to be cross-examined on the statement which he said had just come into his possession. The application was opposed and was refused by the trial judge. This refusal is the subject of one of the grounds of appeal and I will consider this ground in due course. With regard to the application to call further evidence on this appeal, the appellant's advocate, Mr. Gautama, after addressing us at some length, eventually abandoned and withdrew the application. The application as it stood clearly could not have succeeded. The application did not seek to recall the respondent or to call any witness to put the statement in but only sought to put in the statement without any further proof.

The main issue on the appeal was the question as to the responsibility for the accident, i.e. whether the accident was solely due to the appellant's negligence, as the learned judge found, or whether the respondent was to blame wholly or in part. This is admittedly a difficult issue for, as I have pointed out, there was only the evidence of the two parties as to the actual occurrence and the appellant's recollection due no doubt to his severe injuries is hazy and the respondent's evidence is also uncertain. There is also a lack of any accurate measurements or other evidence as to the position of the vehicles after the accident as the respondent had quite understandably, in the absence of any other assistance, hurriedly taken the appellant in his car to the hospital for treatment.

The learned judge accepted the respondent's version of the evidence. Mr. Gautama in arguing the case for the appellant also bases the appellant's case on the respondent's evidence and he complains that the trial judge completely misdirected himself in his findings. This is a question of fact but an appeal to this Court from the High Court is by way of a retrial, and I would here quote from the judgment of Sir Clement de Lestang, V.-P. in the case of *Selle and another v. Associated Motor Boat Company Ltd. and others*, [1968] E.A. 123, at page 126, where he clearly set out the principle on which this Court acts:

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v. Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)."

Before considering in detail the evidence before the learned judge and his findings I would mention here that it appears from the record that the judge, although reluctantly, did visit the locus in quo, but unfortunately there is no report of his visit on the record although this is mentioned in his judgment. The judge does not in this case appear to have relied on any of his own observations, but in cases where the court finds it expedient to visit a locus in quo, the court should make a note of what took place during the visit in its record and this note should be either agreed to by the advocates or at least read out to them, and if a witness points out any place or demonstrates any movement to the court,

then this witness should be recalled by the court and give evidence of what occurred.

After reviewing the evidence the learned judge made the following findings:

> "It is my finding that there was no collision and that the defendant's account is for acceptance. I believe that he started to come out thinking it safe to do so (though he should not have decided to cross the white line) and seeing a motor-cycle coming at speed (though nearer than 200 yards away) he stopped. The manner of his stopping and the place of his stopping fixes him with no negligence. He did not provide any emergency. Had the plaintiff been driving at a proper speed and with a proper look-out there was no reason why he should not comfortably have passed by or stopped. He must have applied his brakes but it was too late when he did so and then efficiency was in any event impaired as Mr. Barber indicates. Generally speaking, indeed, the heads of negligence spoken to by the defendant have been made out.
>
> It follows that the plaintiff loses."

It is the appellant's case that the respondent, having come from what was at the best only an open yard on to the main trunk road and having seen the appellant approaching, then decided to cross in front of the appellant to get over to the opposite side of the main road at a time when this was a highly dangerous manoeuvre, and that this was the main cause of the accident. A reference to the plan in evidence makes it clear that the appellant was proceeding along the main road and that the respondent was coming out of a side entrance and had to go across the road to get on to his correct lane in order to proceed to the city centre. The appellant therefore had the right of way and the respondent had to exercise a high degree of care in coming on to and going across the main road.

The appellant's advocate has referred to various passages of the respondent's evidence and it does appear from this evidence that the respondent first came to the entrance to the main road and there stopped, saw the appellant on his motor-cycle at a distance which he estimates at some 200 yards away and then decided to cross the main road and started to do so, but after proceeding only a short distance across the main road discovered that the appellant was then only some 40 yards away and then he stopped and the accident occurred. The respondent's evidence is as I have said not altogether clear and he does at times contradict himself but the following extract from his evidence supports the appellant advocate's version. I quote:

> "I left my children and then came to entrance Y. To the main road. I stood there and looked at traffic on both directions. To my left I saw nothing at all. But at a great distance, say 200 yards, a motor-cycle coming towards City Park direction. At this time I was about 1½ feet on the road. I stopped to allow the motor bike to pass by. He came towards the white line in the middle of the road and three yards before reaching to my car his front wheel turned sharply to the left. The rider lost control of the motor-cycle and was thrown in the air. He fell on the road and with the momentum hit on the right hand side of my bumper."

And then further:

> "The motor-cycle was travelling from Ngara. I had seen it from 200 yards away. It was travelling quite fast. In relation to centre of road it was travelling along the white line. After the accident the motor-cycle was lying on oncoming traffic side, i.e. on the motor-cycle's other side, i.e. off side of white line in direction it was going. It was on the line that is the wheels were

> on the white line. The motor-cycle was on its side with wheels on white line and the whole of it was on the concoming traffic side – it was facing towards St. Francis Xavier's Church. The two wheels were on the white line and the top of the bicycle was on its wrong side. I was to go back to Ngara. My vehicle was slightly facing to city side. Not to city side but across the road. I was intending to go over the white line."

And then in cross-examination he said:

> "I saw the motor-cycle 200 yards from entrance Y. Its speed should be more than 40 m.p.h. I stopped at entrance Y. I thought he was far – 200 yards – I had then already gone 1½ feet into the road then. I looked both ways, saw the motor-cycle 200 yards away and went 1½ feet into the road. When I stopped on the road the motor-cycle was approaching very fast – that is why I had to stop. When I first saw the motor-cycle it was far and I started to cross but when it was about 40 yards away I stopped. It went 160 yards while I went 1½ feet. *Q*. You were accused in traffic case and Mr. da Gama Rose appeared for you? *A*. Yes. Yes, I instructed him to appear for you. *Q*. He said you were two feet on the road? *A*. I will accept it if you say so. I measured nothing there. My distances are being given approximately. When I reach Y I had stopped very long before entering the road."

From this last extract from his evidence it does appear that the respondent is saying that he stopped first at the entrance Y where he saw a motor-cycle approaching in the distance and that he then started to cross the road but had to stop because it would appear that he had either misjudged the speed or the distance of the motor-cycle or else that he had himself taken too long to move across the road and that he had to stop. This last alternative appears most probable as both the respondent himself and the appellant stated that the respondent was moving slowly out into the road.

The position then as it appears to me from the evidence was that the appellant was proceeding along the main road on his motor-cycle at a fair speed; there is no accurate evidence of his speed but having regard to the comparative lack of damage to the motor-cycle this could hardly have been at a very high or excessive speed. The motor cycle was, however, proceeding along the main road free of any other traffic except for the respondent's car coming out of a side entrance. The respondent's car stopped as it should have done and at this point the appellant had the right to proceed and to expect the respondent's car to wait until he had passed. With respect it appears to me that the learned judge did not correctly direct himself on this point. I would refer here to that portion of his judgment where he refers to the appellant's evidence, where the appellant said:

> " '. . . I saw a car coming from the left hand side of the road. It was coming on to the main road. He was coming out of a road after the school sign.' "

The learned judge commented:

> "Pausing there I would make three comments – Whittenbury Road is a long way back, perhaps 200 yards from the accident, the road is about 30 feet wide and caution was called for if a vehicle was coming into the road at Y."

Here clearly the judge was referring to the appellant on his motor-cycle as being the person from whom the caution was required. I agree that some degree of caution is needed by all drivers even if they have the right of way on the main road, but a much higher degree of caution is needed by the driver coming out

of a side road or entrance on to the main road. The learned judge however goes on to refer further to the appellant's evidence and said:

> "If, from so far back, the plaintiff saw that the car was of a particular make and what it was doing then it surely should have been allowed to proceed."

In my view this does appear to be a misdirection. The judge is in fact saying that it was the duty of the driver on the main road to stop and allow the vehicle coming out on the side road to proceed and come on to the main road. This would be a reversal of the ordinary rule. A driver on the main road may be negligent if he did not or could not stop in time in order to avoid an obstacle on his path-way but a greater duty of care must lie on the driver of the vehicle coming out on to the main road who should only do so when he would cause no obstruction to the users of the main road.

On the evidence before the court I am of the view that the learned judge has misdirected himself on the facts and also on the law in finding that the respondent was free of any blame for the accident. It is not clear how far in fact the respondent travelled on to the main road. The respondent himself estimated this as 1½ to two feet and the judge accepted this estimate but this distance is extremely doubtful. At one stage the respondent said that motor-cycle was lying on the further side of the white line with its wheels on the white line and that this motor cycle was about three feet from his car. The width of one of the lanes of the road was 15 feet so that this estimate would put his car about 12 feet on to the road. The respondent's witness Dodhia estimated that the motor cycle was about ten feet from the car and this would place the car at least five feet into the road. Whatever this distance may have been, it, however, clearly appears from the evidence that the respondent was partly to blame for the accident in coming on to the road and endeavouring to pass in front of the pathway of the motor-cycle at the time and manner in which he did and that this was the primary cause of the appellant's manoeuvres resulting in his fall and injuries. I would note here that the judge did find that the respondent "should not have decided to cross the white line". I am therefore of the view that the judge erred when he found that the respondent was not partly to blame for the accident.

I am however also of the view that on the evidence the appellant was also negligent. The primary cause of the accident was the respondent's wrongful attempt to cross over the main road, but the evidence does establish that the appellant was also negligent in the control of his vehicle. The evidence of Mr. Barber, the expert called by the respondent, showed that the rear tyre of the motor-cycle was smooth and in his opinion this caused the motor-cycle to skid out of control as the rear end would have swung to the road and this would result in the appellant turning his front wheel to the left to counteract this. The learned judge found that the appellant lost control of his motor-cycle which somersaulted and threw the appellant into the air and I agree that the judge was justified in this finding.

This is a case in which this court has all the evidence before it and is in a position to and should apportion the blame between the parties. The respondent was extremely negligent in attempting to cross over the road in the manner that he attempted but then the appellant was equally negligent in riding his motorcycle with a smooth rear tyre and in his control of the motor-cycle following upon the respondent's manoeuvre.

In all the circumstances I am of the view that both parties were equally to blame for the accident and that the fairest appointment of blame would be 50% on each party.

I would here consider the fifth ground of appeal which is a complaint that the

learned judge erred in not allowing the respondent to be recalled for further cross-examination on the statement. Section 146 (4) of the Evidence Act gives the court the discretion in all cases to permit the witness to be recalled for further examination-in-chief or for further cross-examination. Order 17, r. 12 permits the court, at any stage of the suit, to recall and examine any witness. In this case both the plaintiff and defendant's case had been closed. I am of the view that the judge could have allowed the witness to be recalled for cross-examination but this was a matter within his discretion and it should only be exercised in exceptional cases where an injustice might otherwise result. In this case it does not appear to me that the learned judge wrongly exercised his discretion. It does not appear from the record that any sufficient reason was given why the statement was not available before the close of the defendant's case. Its existence seems to have been well known to both parties and there had been a previous case in the magistrate's court. It does not also appear from the record that the learned judge was informed that the statement contained any admissions by the respondent which might have affected the issue. I am therefore of the view that the judge was correct in not allowing the further cross-examination and accordingly the statement was not evidence either at the trial or on the appeal.

I would accordingly allow this appeal and find that the appellant and the respondent were both to blame for the accident and that the responsibility for any damage arising from the accident should be apportioned as to 50% on each party. I would accordingly quash the judgment and decree of the High Court and send the matter back to the High Court for the assessment of damages and the apportionment in accordance with the ratio that I have set out. I would also quash the order for the costs in the High Court and order that these costs be in the discretion of the Judge of the High Court who completes the trial. I would allow the appellant the costs of this appeal.

Sir Charles Newbold P: I have had the advantage of reading in draft the judgment of Duffus, V.-P., and I agree with it.

A person at the side of, or near to, a main road owes a duty of care to a user of the main road not to take such action as would reasonably cause apprehension in the mind of that user that such person is about to enter the main road in the circumstances which might well result in an accident. If he fails in that duty of care and as a result damage is caused, then he is liable at least for part of such damage. In this case I accept the finding of the trial judge that the defendant did not travel more than about two feet into the road. But it is clear that the action the defendant took was such as to lead to a reasonable fear in the mind of the plaintiff that the defendant would cross the road in front of him in circumstances in which if the plaintiff did not take immediate evasive action there might well be an accident. The defendant thus failed in his duty of care to the plaintiff. This failure was one of the direct causes of the accident. The result is that the defendant is liable for at least a part of the damage resulting from that accident.

The plaintiff also owed a duty of care to the defendant, who was the person on or near a road, not to use on the road a vehicle in a condition likely to give rise to an accident and not to drive the vehicle in a manner which would result in an accident. In this case the plaintiff by using a motor-cycle whose rear tyre was in a condition likely to cause an accident failed in his duty of care to the defendant. The fact that in taking evasive action the plaintiff fell off his motorcycle, something which should not normally have happened, in the absence of any satisfactory explanation showing an absence of negligence on his part, points ipso facto to negligence on the part of the plaintiff. It matters not whether the fall arose from the negligence in using a motor-cycle with a tyre in that condition or from negligence in the manner in which the motor-cycle was driven, or a combination of both. This negligence on the part of the plaintiff was also a

direct cause of the accident. Thus the plaintiff also is liable at least in part for the damage resulting from the accident.

In the result it was the negligence of both parties which led to the accident and I agree with Duffus, V.-P., in his apportionment of 50% of blame to each party.

The fifth ground of appeal attacked the decision of the trial judge refusing to permit the defendant to be recalled for cross-examination after the defendant's case had been closed on a statement alleged to have been made by him. It was urged that this could have been done under O. 17, r. 12. I do not agree. That rule empowers a judge to recall a witness and put questions to him at any stage. It is a power which should be exercised with caution and only in exceptional circumstances where the evidence in the case has been completed. The power in s. 146 (4) of the Evidence Act to permit a witness to be recalled for further examination and cross-examination is a power which in a civil case should be exercised only in the most exceptional circumstances where the evidence has been completed, and then only if the judge is satisfied that the further evidence is likely to have a material effect on the case and that there is good reason why such further evidence was not given in the normal way. In my view the trial judge was perfectly correct in this case in his refusal to permit the defendant to be recalled in order that he be questioned on a statement allegedly given by him long before the trial and of the existence of which the plaintiff knew or should have known. Further, in order that the trial judge should be in a position properly to exercise his discretion, the alleged statement should have been shown to him. It does not appear that this was done.

For these reasons I agree with the order proposed by Duffus, V.-P., and it is ordered accordingly.

Law JA: I have read in draft the judgments prepared by the learned Vice-President and President. I agree with them and with the order proposed.

Appeal allowed. Appellant and respondent both found equally to blame. Judgment and decree of High Court quashed and case remitted for assessment and apportionment of damages, and for decision on High Court costs. Appellant to have costs of appeal.

For the appellant:
Satish Gautama and *TR Johar*
Johar & Co, Nairobi

For the respondent:
KB Keith
Kaplan & Stratton, Nairobi

Premchand Raichand Ltd and another v Quarry Services of East Africa Ltd and others

[1969] 1 EA 514 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 30 May 1969

Case Number: 14/1969 (79/69)

Before: Sir Charles Newbold P, Spry and Law JJA

Sourced by: LawAfrica

Appeal from: High Court of Kenya – Madan, J

[1] Civil Practice and Procedure – Affidavit – Source of information – Must be disclosed.

[2] Civil Practice and Procedure – Commission for examination of witness outside jurisdiction – Issue of – Whether right or discretion – Principles to be observed on granting application – Civil Procedure (*Revised*) *Rules* 1948, *O.* 27, *r.* 5 (*K.*).

Editor's Summary

The appellants applied to the High Court for a commission to take the evidence of the second appellant and of one other witness in India. The application was dismissed on the ground that it was not shown that either person was unable to come to Kenya for the hearing. The appellants appealed and alleged that they had a right to have a commission issued.

Held –

(i) whether to issue a commission or not was a matter for the judge's discretion, and there is no right to have evidence taken on commission;

(ii) so far as is possible, all evidence in a suit should be taken viva voce before the trial court;

(iii) the applicant must always show that the evidence is necessary and that there is some good reason for excusing the calling of the witness;

(iv) the affidavits in support of the application did not disclose the source of the information contained in them and should have been disregarded.

Appeal dismissed.

Cases referred to in judgment:

(1) *Berdan v. Greenwood* (unreported).

(2) *In re Boyse, Crofton v. Crofton* (1882), 20 Ch.D. 760.

(3) *Coch v. Allcock* (1888), 21 Q.B.D. 178.

(4) *Standard Goods Corp. Ltd. v. Harakchand Nathu & Co*. (1950), 17 E.A.C.A. 99.

Judgment

Spry JA: read the following reasons for the judgment of the Court: This was an appeal from a decision of the High Court dismissing an application for the issue of a Commission to take the evidence of Manubhai Ishwarbhai Patel, the second appellant in this appeal and the second defendant in the suit from which it arises, and that of one Manubhai Raichand Shah (to whom we will refer as Patel and Shah

respectively).

We heard and dismissed the appeal on May 8, 1969, reserving our reasons, which we now give.

It would not appear necessary to set out the facts giving rise to the suit and we merely observe that it arises out of transactions which took place in 1957, that the plaint was filed at the end of 1963, that application for a hearing date

was made in February 1969, and that the suit is set down for hearing at the end of this month, in Nairobi.

So far as Patel is concerned it was alleged that he is permanently resident in Bombay, India, and that he could not come to Kenya as his business in India requires his constant and personal attention. As regards Shah, it was also alleged that he is permanently resident in Bombay and that he cannot attend the trial in Nairobi.

The judge said that he was not satisfied that it had been shown that either Patel or Shah was unable to visit Kenya. He added that he took into account the fact that the pleadings showed that the case was a most complicated one, and one in which it would be in the interests of justice for the parties to have the fullest opportunity of cross-examination and for the court to have the opportunity of observing demeanour.

Mr. Mackie-Robertson, who appeared for the appellants, began by submitting that applications of this nature are not matters of judicial discretion of the kind with which an appellate court will not interfere in the absence of a misdirection in law or a patent failure of justice. To support this argument, he relied on the judgment in *Berdan v. Greenwood* (unreported, but printed as a footnote to *In re Boyse*, *Crofton v. Crofton* (1882), 20 Ch.D. 760). He conceded, however, that subsequent cases, from *Coch v. Allcock* (1888), 21 Q.B.D. 178 onwards, are to the opposite effect. Mr. Mackie-Robertson submitted that if an applicant can show that it is necessary for the purposes of justice that the evidence of a witness be taken on commission, he has a right to an order that a commission issue and that this takes the matter outside the sphere of discretion. With respect, we do not agree. We think that the decision whether, in all the circumstances, the interests of justice require the issue of a commission is essentially the exercise of a judicial discretion.

Mr. Mackie-Robertson then attacked the decision of the learned judge on the ground that he had given undue weight to the fact that Patel had formerly lived in Kenya and insufficient weight to the inconvenience that a visit to Kenya would occasion him. He stressed that this is not a case of a person leaving the jurisdiction with the object of avoiding cross-examination. We do not consider that there is any merit in this submission. In the course of his ruling, the learned judge said:

> "As I said the second defendant presumably lived in Kenya for a number of years. If he decides to return to give evidence, it will not altogether be a case of dragging him away from his place of residence."

Mr. Mackie-Robertson submitted, and we agree, that once it was established that Patel is in fact now ordinarily resident in India, for him to give evidence in Kenya will entail him leaving his place of residence. We think, however, that the sentence quoted was really only a passing observation and was used to emphasize the fact that the plaint was not filed against a defendant who was not at that time resident in Kenya.

Mr. Mackie-Robertson also submitted that a defendant who asks for his evidence to be taken on commission stands to lose something, because his evidence so recorded may be less convincing than evidence given in the presence of the trial judge. He argued that if a defendant, who must have the right to defend himself, elects to rely on "second-class" evidence, the court should not, on that account, deny him a commission. Again, with respect, we cannot agree. There is no right to have evidence taken on commission.

It will be convenient here to set out briefly the considerations which should, in our opinion, govern the granting or refusal of an application for a commission to take evidence abroad. The basic principle is that so far as possible all evidence

in a suit should be taken viva voce before the trial court. Anyone who seeks to have evidence taken in any other way is seeking an indulgence from the court and must show good reason to justify his application. It follows from this that the application must be made bona fide and without any avoidable delay. So far as the evidence of parties is concerned, the onus on a plaintiff will normally be substantially heavier than that on a defendant, because the plaintiff will have chosen his forum. The onus will also be heavier where the evidence required is that of a party than where it is the evidence of any other person, because the unwillingness of a party to come, as opposed to his inability, is no reason to allow a commission, whereas a party cannot compel the attendance of a witness who is outside the jurisdiction. In every case, the appellant must show, first, that the evidence is necessary and, secondly, that there is some good reason why he should be excused appearing or calling his witness, as the case may be, in person. In the case of a party, there may be some personal reason, such as ill-health or inability to obtain a visa. In the case of a witness, there may be some similar reason or the application may be based on his refusal to attend. Expense is also a relevant factor, although nowadays the cost of air travel will often be no more than the expense of a commission. The nature of the evidence to be taken is also highly relevant; for example, a commission will more readily be issued where the evidence required is of a formal nature than where exhaustive cross-examination is likely.

We would add that we think the decisions in the older cases should only be applied with caution and that the onus on an applicant today will tend to be heavier than was formerly the case, because with air travel a witness will in most cases be able to attend a trial without being away from his home or business for more than a few days, whereas formerly the journey might have taken weeks or months.

Applying those principles to the present case, we see no reason to think that the learned judge applied any wrong principle or that his decision was wrong and since, as we have said, we regard that decision as the exercise of a judicial discretion, that would have sufficed to dispose of the appeal. But we would go further and say that we think his decision was clearly right, because of the deficiencies in the affidavits which supported the application, a matter which the learned judge may have had in mind but to which he did not expressly refer.

As we have said, a person applying for the issue of a commission has to satisfy the court both that the evidence is necessary and that there is good reason why the person who is to give it should not be required to do so at the trial. So far as the first of these factors is concerned, the plaint alleges that Patel played a major role in the events which gave rise to the suit and we think his evidence is clearly necessary. On the other hand, all that is before us as regards Shah is an affidavit by a director of the first appellant company, who deponed that Shah was in the employment of the company during the material time as an accountant and head clerk. This the deponent could presumably say of his own knowledge. He went on, however, to say “that the evidence and the circumstances of the claim herein are within his (that is, Shah’s) peculiar knowledge. Therefore his evidence is necessary and material on the issue of the Plaintiff’s claim.” In our view, this is far too vague: it is not stated how the deponent knows what evidence Shah is in a position to give, there is no indication what that evidence will be or that it is essential to a just determination of the suit and nothing to show that others, including possibly the deponent, could not equally well give such evidence.

The inadequacy of the affidavit evidence appears even more clearly when the second factor is considered. As regards Patel, who resides in Bombay, all that we have is an affidavit by his son, who resides in Nairobi. No explanation has

been offered why Patel himself could not have sworn an affidavit and it would clearly be wrong to rely on evidence of what Patel told his son if Patel himself was available to testify to the facts. But the position is even worse, because we do not know that the information came from Patel. The son says in his affidavit that he is "advised and verily believes" that his father cannot leave his business to attend the trial but he does not say by whom he was so advised. It has repeatedly been said by this Court that affidavits based on information must disclose the source of information (see *Standard Goods Corporation Ltd. v. Harakhchand Nathu & Co*. (1950), 17 E.A.C.A. 99, et al.). On this ground alone, the judge would have been entitled to refuse to act on the affidavit. This is not merely a matter of form, but goes to the essential value of the affidavit. It may have been sworn in all sincerity and the deponent may have been advised as he says, but since the source of the information may have been unreliable, the affidavit can have no evidential value.

In the case of Shah also, we have a bald statement by a deponent in Nairobi that he is advised and verily believes that Shah, who is in Bombay, cannot attend the trial in Nairobi. Again, there is no indication of the source of the information, so that the affidavit is worthless. Moreover, no reason is given why Shah cannot come to Nairobi and it is not alleged that he has refused to do so. This omission is all the more surprising in view of an admission during the hearing that Shah had been in Nairobi only four days before the affidavit was sworn.

On such evidence, the application could not properly have been allowed and we have no hesitation in dismissing the appeal. In the circumstances, we do not think it necessary to deal with the arguments that were addressed to us on the questions whether the application was made bona fide and as to the responsibility for and the effect of the considerable delays that have occurred.

Appeal dismissed.

For the appellants:
JA Mackie-Robertson, QC and *JJ Patel*
JJ Patel & Co, Nairobi

For the respondents:
C Salter, QC and *VD Shah*
Veljee Devshi & Bakrania, Nairobi

Diamond Concrete Co v Patel & another
[1969] 1 EA 518 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 10 March 1969

Case Number: 51/1969 (85/69)

Before: Chanan Singh J

Sourced by: LawAfrica

[1] Civil Practice and Procedure – Inspection – Document referred to in plaint – Whether inspection will be ordered before filing of defence – Civil Procedure (*Revised*) *Rules* 1948, *O.* 10, *rr.* 14, 15 *and* 17 (*K.*).

Editor's Summary

The plaintiff sued the defendant on a written contract described in the plaint. The defendants asked for inspection of the contract and the plaintiff refused inspection before a defence was filed. The defendants applied for an order for inspection.

Held – inspection of the contract before the filing of the defence would be ordered.

Inspection ordered.

Cases referred to in judgment:

(1) *Quilter v. Heatly* (1883), 23 Ch.D. 42.

(2) *Gopal Bux v. Syed Mohamed* (1944), 22 Pat. 644.

(3) *Ram Dyal Saligram v. Nurhurry Balkrishna* (1884), 18 Bom. 368.

(4) *Khetsidas v. Narotumdas* (1908), 32 Bom. 152.

Judgment

Chanan Singh J: The plaintiff firm claims damages for breach of contract. The contract relied upon is described in the first paragraph of the plaint as "an Agreement in writing dated the 29th November, 1968, and made between the plaintiffs and the defendants".

The defendants entered appearance on January 27, 1969, and gave the plaintiffs' advocates a Notice to Produce Documents under Ord. X, rr. 14 and 15 of the Civil Procedure (Revised) Rules 1948 requiring them to produce for inspection "Agreement dated 29th November 1968 and alleged in paragraph 1 of the Plaint". Messrs. Khanna and Company, for the plaintiffs, refused inspection "on the grounds that, as a general rule, inspection is not allowed before the defence has been put in, or for the purpose of finding out if the defendants have a defence". The reply to the Notice went on to state: "No exceptional reasons for departing from the general rule have been disclosed in this case."

Mr. Satish Gautama, for the defendants, has now applied to this court *inter alia* for an order that the plaintiffs do give inspection of the written agreement in question. The application is made under Ord. X, r. 17 (1) which says that if a party served with a notice does not give inspection "the Court may, on the application of the party desiring it, make an order for inspection". A proviso attached to the sub-rule says that "the order shall not be made when and so far as the Court shall be of the opinion that it is not necessary either for disposing fairly of the suit or for saving costs".

Questions similar to those that arise in the present case were raised in *Quilter v. Heatly* (1883), 23 Ch.D. 42. There, the plaintiff had referred to certain

documents in his statement of claim. The defendant applied for inspection and the plaintiff's solicitors replied: "As the Defendant has not yet delivered his statement of defence and is not yet entitled to discovery, we must object to produce the documents." Chitty, J., referred to the "distinction between inspection and discovery" and then stated:

> "I think some fair ground should be shown for requiring the plaintiff to show his documents before the defence is put in. To my mind, it is very material (especially in such a case as this) that a defendant should pledge himself to some line of defence before he sees these documents. If there were any ground for supposing or suggesting that the documents did not exist, probably I should exercise the discretion differently. . . . I reject entirely the argument that there will be a difficulty in framing the defence unless the documents are inspected. There will not be the slightest difficulty. The defendant can traverse or not admit the documents, and if he chooses to renew the application after he has put in his defence and succeeds in getting an order, he will then be entitled to the usual affidavit of documents, which is a distinct matter" (at pp. 46 – 7).

This view was unanimously rejected by the judges of the Court of Appeal. I quote from the judgment of Lindley, L.J., at p. 50:

> "In *Mercier v. Cotton* (1876), 1 Q.B.D. 442, the Court of Appeal upheld the view that discovery was not to be given as a matter of course before a defence was put in. But as to documents referred to in the pleadings the case is different. The general rules as to discovery of documents are intended to give a party discovery of all documents relating to the case which are in his adversary's possession unless there is some sufficient ground for refusing production. Rules 14–17 of Order XXXI are very differently expressed, and are confined to documents mentioned in the pleadings or affidavits. These rules were evidently intended to give the opposite party the same advantage as if the documents referred to had been fully set out in the pleadings."

Our rules on inspection of documents referred to in pleadings are the same as in India and as Mulla on the Code of Civil Procedure (13th Edn., p. 845) shows, the *Quilter* case has been quoted in India with approval. There are Indian cases to the same effect. For example, it was decided in *Gopal Bux v. Syed Mohamed* (1944), 22 Pat. 644 that a defendant is entitled to inspection of documents referred to in the plaint although he has not filed his written statement (quoted by Mulla, op. cit, p. 845).

Under the Indian practice, a plaintiff has to attach to his plaint a list of the documents on which he relies but I do not think this makes any difference to the position as regards inspection. Both in India and in Kenya, a court may order inspection of documents referred to in the plaint. The short judgment in *Ram Dyal Saligram v. Nurhurry Balkrishna* (1884), 18 Bom. 368, at p. 369 reads:

> "I think inspection must be given. Under the Code the plaintiff is required to mention the documents on which he will rely at the hearing. He has done so, and has mentioned the documents in question. There is, therefore, no difficulty as to the plaintiff knowing what documents he is required to produce. I think, on the authority of *Quilter v. Heatly*, the defendant is entitled to see them, although he has not yet filed his written statement."

See also *Khetsidas v. Narotumdos* (1908), 33 Bom. 152 which contains dicta to the same effect.

Thus, it is clear that the defendant, on the view that the courts in England and India have taken of the corresponding rules in those countries, is entitled to inspection. The proviso to the sub-rule in question goes no further than saying that the court shall not make an order when and if it is of the opinion that such inspection "is not necessary either for disposing fairly of the suit or for saving costs". I am not of that opinion.

The use of the word "may" in the sub-rule gives the court a discretion. The proviso seems to suggest the discretion must be exercised in favour of the refusing party if he can show that inspection is not necessary either for disposing fairly of the suit or for saving costs. More or less the same idea is expressed in the Court of Appeal judgments in the *Quilter* case: Jessel, M.R., states that "the applicant is to have such an order unless good cause to the contrary is shown" (at p. 48); Bowen, L.J., formulates a rule, a little hesitatingly though: "In my opinion the onus is on the refusing party, but if the onus were on the applicant I think he has discharged himself from it" (at p. 51).

I order that the plaintiffs shall give the defendants' advocate inspection of the agreement in question at their own advocates' office after a reasonable notice. The defendants are to file their written statement or statements of defence within ten days of inspection. The defendants shall have the costs of this application.

Order accordingly.

For the applicant:
Satish Gautama
Satish Gautama, Nairobi

For the respondent:
DN Khanna
Khanna & Co, Nairobi

Mamujee Bros Ltd v Awadh
[1969] 1 EA 520 (HCK)

Division:	High Court of Kenya at Mombasa
Date of judgment:	25 April 1969
Case Number:	58/1969 (86/69)
Before:	Mosdell J
Sourced by:	LawAfrica

[1] Sale of Goods – Revesting – Conviction of obtaining goods by false pretences – Whether title to goods revests automatically – Criminal Procedure Code (*Cap.* 75), *s.* 178; *Sale of Goods Act* (*Cap.* 31), *s.* 25 (*K.*).

[2] Sale of Goods – Title to goods – Possession obtained as agent – Whether title given.

Editor's Summary

One Shah delivered to the plaintiff a forged order note alleged to have been drawn by a limited company requesting the plaintiff to deliver goods to Shah. The goods were delivered to Shah who purported to sell them to the defendant. After discovery of the fraud, Shah was convicted of forgery, uttering a false document, and obtaining goods by false pretences, contrary to the Penal Code, ss. 349, 353 and 313. The plaintiff and the defendant both claimed to own the goods.

Held –

(i) the conviction of Shah of obtaining the goods by false pretences did not automatically revest the ownership in the goods in the plaintiff;

(ii) the plaintiff intended to contract only with the limited company and delivery to Shah was only as the agent of that company;

(iii) Shah accordingly obtained no title to the goods and could pass no title to the defendant;

(iv) even if the plaintiff had intended to give title to Shah, his title was voidable and the defendant took the goods with notice of Shah's defective title.

Judgment for the plaintiff.

Cases referred to in judgment:

(1) *Cundy v. Lindsay* (1878), 3 A.C. 459.

(2) *Phillips v. Brooks*, [1919] 2 K.B. 243.

(3) *Hardman v. Booth* (1863), 1 H. & C. 803; 158 E.R. 1107.

(4) *Ingram v. Little*, [1960] 3 All E.R. 332.

Judgment

Mosdell J: This is an application by way of inter-pleader by the Attorney-General in respect of goods held by Mamujee Brothers Ltd. (hereinafter called "Mamujee") on behalf of the Government of Kenya. The claimants are Mamujee and Mr. Awadh bin Abdhi (hereinafter called "Awadh").

The facts shortly are that on November 25, 1968, the police took possession of certain building materials at the premises at the junction of Kipchoge Road and Jomo Kenyatta Avenue, Mombasa belonging to Awadh in connection with the investigation of criminal offences allegedly committed by one Keshavlal Lakhamshi Hirji Shah (hereinafter called "Shah"). The police also took possession of certain documents from Mamujee and Awadh. On December 11, 1968, Shah pleaded guilty before the Senior Resident Magistrate, Mombasa to ten counts of forgery, uttering a false document and obtaining goods by false pretences contrary to ss. 349, 353 and 313 of the Penal Code. He was convicted and sentenced to a total of three years' imprisonment. The goods had been delivered to the yard of Awadh by Mamujee as the result of a purported telephone call from Babulal Narshi and Company Ltd. requesting them to deliver goods to Shah and the production by Shah to Mamujee of an order note purportedly but fraudulently emanating at the instance of Shah from Babulal Narshi and Company Ltd. Part of the goods so fraudulently obtained by Shah were sold by Shah to Awadh for Shs. 3,574/40. It is with this part of the goods that this application is concerned and which I hereinafter call "the goods". Both Mamujee and Awadh are now claiming that the goods belong to them. The goods are presently held by Mamujee as custodians on behalf of the police.

In addition to the affidavit of Mr. Rana, Senior State Counsel, sworn on March 31, 1969, and filed on behalf of the Attorney-General, an affidavit has been filed by each of the claimants, one by Awadh also sworn on March 31, 1969, and one by Najmudin Adamjee Mamujee, a director of Mamujee, on behalf of Mamujee, sworn on April 1, 1969.

Both Mr. Karimbhai on behalf of Mamujee and Mr. Ghalia on behalf of Awadh had agreed that I should deal with the application in a summary manner under Ord. XXXIII, r. 5 of our Civil Procedure Rules. The relevant documents recovered from Mamujee and Awadh have been placed before me by consent of Mr. Karimbhai and Mr. Ghalia.

On the facts as disclosed to me I have to decide whether Mamujee or Awadh has established ownership in the goods and to which one of them the goods should be restored.

Section 178 of the Criminal Procedure Code lays down that where:

> "a person guilty of any such offence as is mentioned in Chapter XXVI to XXXI, both inclusive, of the Penal Code, in stealing, taking, obtaining, extorting, converting or disposing of, or in knowingly receiving, any property,

> is prosecuted to conviction by or on behalf of the owner of such property, the property shall be restored to the owner or his representative."

Subsection (2) of s. 178, ibid., gives the power to the court convicting such an offender:

> "to award from time to time writs of restitution for the said property or to order the restitution thereof in a summary manner."

Proviso (i) to this section reads as follows:

> ". . . where goods as defined in the Sale of Goods Ordinance have been obtained by fraud or other wrongful means not amounting to stealing, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender."

The conviction of Shah, therefore, does not mean that the property in the goods revests in Mamujee automatically. This section 178 of the Criminal Procedure Code has its counterpart in s. 25 of the Kenya Sale of Goods Act (hereinafter called "the Act") which reads as follows:

> "(1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale or otherwise.
>
> (2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to theft, the property in such goods shall not revest in the person who was the owner of the goods or his personal representative, by reason only of the conviction of the offender."

The sections of the Act most relevant to this application are ss. 23 and 24 which so far as is relevant read as follows:

> "23. (1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."
>
> "24. When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title."

As I understand the position in law, Awadh can have no title to the goods if (i) Shah's title thereto was void, or if (ii) Shah's title thereto was voidable, but not avoided at the time of the sale of the goods to Awadh and Awadh bought the goods mala fide and with notice of Shah's defect in title therein.

It is convenient first before renewing acquaintance with such cases as *Cundy v. Lindsay* (1878), 3 A.C. 459 and *Phillips v. Brooks*, [1919] 2 K.B. 243, and other less well known cases on contractual mistake or fraudulent misrepresentation, to consider the question whether or not, on the assumption that Shah's title was voidable and had not been avoided, Awadh bought the goods in good faith and without notice of Shah's defect of title in them. It is clear on the facts that if Shah's title to the goods was voidable it had not been avoided before the sale of the goods to Awadh. I have to rely in coming to a solution on the problems raised in this application on the material disclosed in the

respective affidavits to which I have already referred and to the documents recovered from Awadh and Mamujee. Awadh was not prosecuted for any criminal offence but I think considering the material before me as a whole it can with justification be said that Awadh bought the goods mala fide with notice of Shah's defect of title. I reach this finding not on the basis that the standard of proof required is beyond reasonable doubt as in a criminal case but on the balance of probabilities as required in a civil case. Awadh apparently deals in new and second-hand goods which he buys from members of the public and from shops and firms in Mombasa. He sells new and second-hand goods mostly to Africans, Arabs and Indians. He knew Mamujee and had on several previous occasions bought building materials from that firm. But consider the following facts:

1. Goods were brought to Awadh's "junk yard", as Mr. Ghalia put it, on eight different occasions on or about November 12, 15, 18, 20 and 23, 1968. On the first occasion Shah told Awadh he had "bought a lot of goods for a large building project and that he had no further need and use for them". Why then did he apparently go on buying goods from Mamujee on dates subsequent to November 12, 1968? This fact is evident from the documents recovered from Awadh.
2. The initial load of goods was brought to the junk yard on one of Mamujee's lorries with a driver whom Awadh knew and on which there were labourers whom Awadh believed to be employees of Mamujee. According to the affidavit of Najmudin Adamjee Mamujee between November 12, 1968, and November 25, 1968, no fewer than eight deliveries were made by Mamujee to Awadh's yard. It is reasonable to assume that the other seven deliveries of goods to Awadh were made in a similar manner.
3. Goods to the value of Shs. 11,220/30 were delivered by Mamujee to Awadh's junk yard. Of these goods Awadh bought goods worth Shs. 5,969/25 for which he paid Shah a total of Shs. 3,574/40.
4. Paragraph (6) of Najmudin Adamjee Mamujee's affidavit reads:

 "Only on the 12th day of November, 1968, the said Keshavlal accompanied our driver with the goods. He did not accompany our drivers for the subsequent deliveries which were all made to the said Awadh Bin Abdi who took the delivery notes from our drivers and the said delivery notes were brought back to us by the said Keshavlal duly signed later in the day."

As against these facts Awadh in paragraph 19 of his affidavit deposed:

> "In my business the margin of profit is very small. The customers are from lower income bracket looking for cheaper materials. It is not unusual in this business to buy materials new and old/second-hand at bargain prices. It is also not unusual to buy building materials at a price which may well be 50% of the value of the goods."

It may well be his practice to buy building materials at a price below 50% of their value but not surely in such bulk and in such circumstances as those in which he acquired the goods from Shah? I hold, then, that Awadh bought the goods mala fide and with notice of Shah's defect of title. This would be sufficient to dispose of this application as it would result in Awadh obtaining no title to the goods and an order for their restoration to Mamujee would follow. However, in case I am wrong in so holding I proceed to consider the matter on the basis that Awadh bought the goods bona fide and without notice of Shah's defect of title.

Was Shah's title to the goods void or voidable? It was submitted by Mr.

Karimbhai that Shah was merely considered by Mamujee as an agent or servant of Babulal Narshi and Company Ltd.; that Shah merely got possession of the goods and that therefore his title to the goods was void ab initio. In support of this submission Mr. Karimbhai referred to Benjamin on Sale (8th Edn.), pp. 436 – 7. There is to be found the following:

> "It was not until 1866 that it was finally settled whether the property in goods passes by a sale which the seller has been fraudulently induced to make, but there is now no room for further question; for it is established by the cases cited, that whenever goods are obtained from their owner by fraud, we must distinguish whether the facts show a *sale* to the party guilty of the fraud, or a mere delivery of the goods into his *possession*. In other words, we must ask whether the owner intended to transfer both the property in, and the possession of, the goods, or to deliver nothing more than the bare possession. In the former case, there is a contract of sale, however fraudulent the device, and the property passes; but not in the latter case.
>
> In the former case the contract is *voidable* at the election of the seller, not void ab initio. It follows, therefore, that the seller may affirm and enforce it, or may rescind it. He may sue in assumpsit for the price, and this affirms the contract, or he may sue in trover for the goods or their value, and this disaffirms it. If he affirm, he must affirm the contract on all its terms. But in the meantime and until he elects, if the buyer transfer the goods in whole or in part, whether the transfer be of a general or of a special property in them, to an innocent third person for a valuable consideration, the rights of the original seller will be subordinate to those of such innocent third person (section 23 of the Act). If, on the contrary, the intention of the seller be not to pass the property, but merely to part with the *possession* of the goods, there is no *sale*, and he who obtains such possession by fraud can convey no property in them to any third person, however innocent, for no property has passed to himself from the true owner."

In his affidavit Majmudin Adamjee Mamujee deposed in paragraphs (2), (3) and (4) as follows:

> "(2) On the 12th day of November, 1968, I received a telephone call purporting it to be from Messrs. Babulal Narshi and Company Ltd. requesting me to deliver some building materials to one Keshavlal who would call on me with their order note.
>
> (3) Soon thenafter the said Keshavlal called on me with an order note bearing the rubber stamp of Messrs. Babulal Narshi and Company Ltd. and signed by somebody purporting to be the company's director.
>
> (4) On the instructions of said Keshavlal the goods were transported in our company's vehicle to the yard of one Awadh Bin Abdhi. The said Keshavlal told our driver which I verily believe to be true that the goods were to be left with Awadh Bin Abdhi on his yard because the site of construction was further in and that he would then arrange to carry the goods to the site."

All the documents produced indicate that Mamujee intended to contract with Babulal Narshi and Company Ltd. Paragraph (7), ibid., reads:

> "It was then discovered that no orders were in fact placed by Messrs. Babulal Narshi and Company Ltd."

I have not the slightest hesitation in finding that Mamujee intended to contract

with Babulal Narshi and Company Ltd. and that delivery was made to Shah only as their servant or agent. See *Cundy v. Lindsay* (1873), 3 A.C. 459; *Hardman v. Booth* (1863), 1 H. & C. 803; *Ingram v. Little*, [1960] 3 All E.R. 332. This would mean that Shah obtained no title to the goods and as he could pass on to Awadh no better title than the one he himself possessed, Awadh obtained no title either. This would also result in an order for the restoration of the goods to Mamujee. But I proceed to consider the position on the basis that Mamujee intended to contract with Shah. Here it would not be a question of mistake but of fraudulent misrepresentation – a fraudulent misrepresentation by Shah that Babulal Narshi and Company Ltd. wished Mamujee to contract with Shah. If this was the case, then I think the position would be similar to that in *Phillips v. Brooks* where the fraudulent person obtained a voidable title and in the circumstances the pawnbroker obtained a good title under s. 23 of the Sale of Goods Act 1893 of the United Kingdom. So here Shah would have obtained a voidable title which was not avoided and in the circumstances Awadh would have obtained a good title under s. 24 of the Act.

However, I am of the opinion that Mamujee intended to contract with Babulal Narshi and Company Ltd. and not with Shah whom they regarded as the latter's servant or agent.

In sum then I hold that Awadh did not buy the goods bona fide and without notice of the defect of title of Shah, but if I am wrong in so holding I hold that Mamujee intended to contract with Babulal Narshi and Company Ltd. and that they made delivery of the goods to Shah as the latter's servant or agent. In either case Awadh got no title to the goods.

Mamujee's claim, therefore, succeeds and I order that the goods be restored to Mamujee as the rightful owner thereof.

The question of costs I reserve for further argument.

Order accordingly.

For the plaintiff:
KM Karimbhai
KM Karimbhai, Mombasa

For the defendant:
S Ghalia
Sadiq Ghalia, Mombasa

Re an Advocate
[1969] 1 EA 526 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	13 June 1969
Case Number:	40/1968 (88/69)
Before:	Sheridan Ag CJ
Sourced by:	LawAfrica

[1] Advocate – Professional misconduct – Hearing by High Court – Whether practising certificate would be renewed – Advocates Act (*Cap.* 258), *s.* 10 (*U.*).

Editor's Summary

In disciplinary proceedings against an advocate a committee reported to the High Court a *prima facie* case of professional misconduct. The advocate disputed the findings. The hearing before the High Court was adjourned because the advocate was in England. On his return the Chief Justice ordered that his practising certificate be not renewed. On application for review of this order:

Held – in the circumstances of this case a practising certificate would not be issued, but that the hearing would be expedited.

Order accordingly.

No cases referred to in judgment

Judgment

Sheridan Ag CJ: This is an application for me to review my order dated February 18, 1969, made under s. 10 (*a*) of the Advocates Act (Cap. 258) that the practising certificate of Mr. M. M. Akhtar should not be renewed.

On October 5, 1963, the secretary of the Law Society wrote to the Attorney-General referring him to Mbale District Court Criminal Case No. 321 of 1963, in which Mr. Akhtar was the accused. In his judgment the trial magistrate made strong adverse comments on Mr. Akhtar's conduct. Although an appeal against the conviction was allowed these comments were unaffected.

Disciplinary proceedings against Mr. Akhtar were taken by a Committee under Part III of the Act. They did not commence until December 13, 1967. I am informed that the long delay was at least partly attributable to Mr. Akhtar's absences from Uganda.

On January 15, 1968, the Committee reported to the High Court under s. 15 (*d*) of the Act that a *prima facie* case of professional misconduct had been established against Mr. Akhtar under six heads. Without enumerating them, it is clear that, if substantiated, they might, in the opinion of the Chief Justice, which is the criterion, result in his name being removed from the Roll – and that is a relevant consideration in the exercise of my discretion under s. 10 (*a*) of the Act.

On February 6, 1968, the Acting Chief Registrar wrote to Mr. Akhtar requiring him under s. 17 (1) of the Act to state whether he accepted or denied the findings in the report. By his letter dated February 17, Mr. Akhtar denied the findings.

On March 11 the matter came before the then Chief Justice. Mr. Musaala, who was then appearing for Mr. Akhtar, informed the court that he had left

for the United Kingdom and that he – Musaala – was without instructions but that he believed that as soon as Mr. Akhtar had settled down in the United Kingdom he would write giving him instructions. The matter was adjourned.

Mr. Binaisa, for Mr. Akhtar, informs me that the reason why he went to the United Kingdom was that, not being a Uganda citizen, he wished to beat the restrictions on immigrants, which were about to be imposed by the new Immigration Act. However that may be, he seems to have changed his mind and now seeks to resume his law practice in Uganda.

On April 1, 1969, when the matter came before me, it had to be adjourned to a fresh date to be fixed by the Deputy Registrar as the Attorney-General had not been served. For some reason unknown to me, no fresh date was fixed.

In support of his application, Mr. Binaisa refers to three previous cases where advocates had not been refused practising certificates until after their names had been removed from the Roll. Each case must be judged on its merits. In none of those cases does it appear that the advocates played "cat and mouse" with the court as Mr. Akhtar had done. The best solution will be for the hearing under ss. 17 and 18 of the Act to be expedited, and I so order.

Before leaving this matter, I would refer to the anomalous position which arises when an advocate denies the findings of the Committee. Under s. 18 (2) of the Act, it has to enquire de novo into the allegations of misconduct made against the advocate. This involves two hearings and makes the findings of the first Committee valueless. As far as I am aware, this is an unique provision and it calls for amendment.

The application is dismissed with costs.

Order accordingly.

For the applicant:
GL Binaisa, QC
Binaisa & Co, Kampala

For the respondent:
MCL Gaiger (Principal State Attorney)

Pardhan v Osman
[1969] 1 EA 528 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	2 December 1968
Case Number:	1/1968 (33/69)
Before:	Hamlyn J
Sourced by:	LawAfrica

[1] Costs – Appeal – Quantum of costs – Principles on which appeal court will interfere.

[2] Costs – Disallowance of fees – Discretion of taxing officer – Whether reasons for exercise of discretion must be recorded – Advocates Remuneration and Taxation of Costs Rules, r. 41 (*T.*).

Editor's Summary

On the respondent's bill of costs, the taxing officer taxed Shs. 4,000/- off the claimed instruction fee of Shs. 7,500/-. He did not disallow the costs of drawing and filing the bill, nor did he record any reasons for not so doing. The appellant appealed, alleging that the instruction fee allowed was so excessive that a wrong principle had been adopted, and that the costs of drawing and filing the bill should have been disallowed.

Held –

(i) this was not the exceptional case in which the quantum awarded by the taxing master should be interfered with;

(ii) the taxing officer did not have to give his reasons for exercising his discretion not to tax off the costs of drawing and filing the bill.

Appeal dismissed.

Cases referred to in judgment:

(1) *Khatijabhai Jiwa Hasham v. Zanab Chandu Nansi*, [1957] E.A. 255.

(2) *Re Buhemba Mines Ltd*. (1940), 1 T.L.R. (R) 597.

(3) *In the Estate of Ogilvie, Ogilvie v. Massey* (1910), 103 L.T. 154, C.A.

Judgment

Hamlyn J: In High Court Civil Appeal No. 17 of 1967 the appeal was dismissed, the respondent being granted the costs of the case on November 20, 1967. The respondent thereafter filed his bill of costs which came before the Deputy Registrar for taxation on July 27, 1968, and was argued by counsel on either side; on August 17, 1968, the Deputy Registrar delivered his ruling on the matter of costs, in which he taxed a sum of Shs. 4,000/- off the Shs. 7,500/- claimed as instruction fee, leaving the other items claimed by the respondent undisturbed. The bill was taxed at a total of Shs. 4,866/- in respect of the Shs. 7,866/- claimed by the respondent, and it is from such taxation that reference has been made to this court.

During the course of arguments, counsel for the appellant contended not only that the sum allowed to the respondent was excessive in so far as the instruction fee is concerned, but also that the taxing officer should have applied what is popularly known as "the one-sixth rule", and should have struck out from the bill the claims consequent upon drawing and filing the bill and of the attendances at court in respect of its taxation.

The application therefore concerns only two matters:

(*a*) The quantum of the instruction fee, and

(*b*) The question of the application of the "one-sixth rule".

It will be convenient therefore if I deal with these matters in the order in which I have noted them above.

Counsel for the appellant and the respondent referred me to a number of authorities in respect of assessment of the true amount of the instruction fee. I bear in mind however the oft-repeated principle that judges, lacking the experience of taxing masters, will not interfere with the quantum allowed as an instruction fee upon taxation, unless it is manifestly so high or so low that it calls for interference by reason of some misdirection having occurred or some wrong principle having been adopted.

Counsel for the appellant referred me to *Khatijabai Jiwa Hasham v. Zanab Chandu Nansi*, [1957] E.A. 255 – a decision of the Court of Appeal upon taxation. In the judgment in that case the court expressly refrained from suggesting any rate of remuneration by the hour for work done by an advocate in chambers in the preparation of a case. The court, however, referred by way of analogy to the fees chargeable during the hearing of a case before the court and adopted a figure of Shs. 525/- on a seven-hour basis under the Schedule. It was argued that the solicitor's work on behalf of the respondent was virtually nil, while the brief fee did not warrant the figure at which it had been allowed.

Now it has been accepted since the ruling in *Re Buhemba Mines Ltd.* (1940), 1 T.L.R. (R.) 597 that an instruction fee includes both solicitor's and barrister's work, and includes both attendances for taking instructions as well as all other work necessary for preparing the case for trial.

The taxing officer, in arriving at his decision with regard to the quantum of instruction fee, has set out briefly the arguments of counsel supporting and opposing the bill. He then goes on to observe:

> "None of the arguments of the advocates can be dismissed or upheld altogether and having regard to these arguments and considering the work actually put in during this appeal, I am of the view that Shs. 7,500/- is excessive. I reduce the instruction fee to Shs. 3,500/- and accordingly tax off Shs. 4,000/- on this item."

The Registrar has dealt with the matter of this fee on a somewhat general basis – that is, he has not arrived at his assessment of the fee by any mathematical manipulation. I do not think that the remarks made by the Justice of Appeal in the *Khatijabai* case were intended to indicate that the free decision of a taxing officer in this matter was to be subjected to the application of any magic formula which, when applied, would result in a precise figure being arrived at in an almost automatic manner. Every case must be adjudged on its own merits and on its particular circumstances.

Counsel opposing the bill has sought to confine the question of quantum to a resolution upon these mathematical grounds, working upon a figure of Shs. 200/- per diem. While I consider that such method of procedure is of assistance to a taxing officer, other matters must also be borne in mind by the court in arriving at its decision – the prolixity of the case in respect of its preparation and any peculiar complications in its presentation in court. In a very variable degree also the amount of the subject matter involved may have a bearing, though this may not always be so.

It is clear that the Deputy Registrar has not set out in his ruling any statement which gives evidence that a wrong principle has been followed by him. Counsel opposing the bill has sought to persuade this court that the taxing officer has proceeded upon such erroneous principle, but, other than putting forward a thesis that the matter is governed by a simple mathematical formula, his real

complaint seems to be the actual sum arrived at in taxation and not the mode by which such sum was calculated.

In *In the Estate of Ogilvie, Ogilvie v. Massey* (1910), 103 L.T. 154, C.A., Buckley, J., said:

> "On questions of quantum the decision of the taxing officer is, generally speaking, final. It must be a very exceptional case in which the court would even listen to an application to review his decision."

I cannot think that this is the kind of "exceptional case" to which the judge refers. I consequently rule that the opponent of the bill has not made out a case sufficient to warrant this court interfering with the discretion of the taxing officer in the matter of the instruction fee.

In so far as the "one-sixth rule" is concerned, counsel opposing the bill complains that the Deputy Registrar has failed to direct his mind with regard to this and that, this being so, the rule should apply, for the terms of the proviso have not been considered.

Rule 41, Part III of the Advocates Remuneration and Taxation of Costs Rules reads:

> "Should more than one-sixth of the total amount of the bill of costs exclusive of court fees be disallowed, the party presenting the bill for taxation shall not be entitled to the costs of such taxation:
>
> Provided that, at the discretion of the Taxing Officer, any instruction fee claimed may be disregarded in the computation of the total amount of the bill any amount taxed off that fee in the computation of the one-sixth."

The question then before the court is whether the taxing officer has acted under the proviso to the rule in disregarding the amount taxed off the instruction fee. The appellant says that he has not properly disregarded it; the respondent that he has.

I must confess that it is a little difficult for me to hold that the taxing officer has not "disregarded in the computation of the total amount of the bill any amount taxed off that fee (the instruction fee) in the computation of the one-sixth". He has not referred to it at all and clearly has disregarded it. I think that what the appellant really means is that, if the taxing officer disregards the instruction fee in the "one-sixth rule", he should say so and record his reasons; this is not however what he specifically says either in his Application or in the affidavit attached thereto, nor indeed does the rule require this. I do not think, in view of the silence in the wording of the rule, that it would be proper for this court to read into it anything to the effect that the taxing officer can exercise his discretion only after recording his reasons. True, discretion is to be exercised judicially and not capriciously in these matters, but there is nothing to show that the taxing officer has exercised his discretion improperly or not in accordance with the rule. In these circumstances I hold that he was entitled to disregard the "one-sixth rule" as he has done.

As a consequence, this application must be and is hereby dismissed. The respondent will have his costs in the matter.

Appeal dismissed.

For the appellant:
AA Lakha
Fraser Murray, Roden & Co, Dar-es-Salaam

For the respondent:
Tahir Ali
Tahir Ali & Co, Dar-es-Salaam

P Ltd v Commissioner-General of Income Tax

[1969] 1 EA 531 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	14 February 1969
Case Number:	88/1968 (74/69)
Before:	Trevelyan J
Sourced by:	LawAfrica

[1] Income Tax – Deduction – Investment allowance – Building – Whether confined to industrial building – East African Income Tax (*Management*) *Act* 1958, *Schedule* 2, *para.* 27 (*e*).

Editor's Summary

The appellant company claimed an investment allowance for the year 1965 under para. 27 (*e*), Second Schedule, East African Income Tax (Management) Act 1958, in respect of machinery purchased and installed in its premises. The issues were whether the appellant's premises were a building within para. 27 (*e*); whether the machinery was subsequently used for the purpose of a trade consisting of the manufacture of goods and materials; and if so whether the machinery was in replacement or substantial replacement of machinery previously used in the existing trade of the appellant.

The facts are set out in the judgment.

Held –

(i) "Building" in para. 27 (*e*), Second Schedule, is not confined to a non-industrial building (*K. Ltd. v. Commissioner of Income Tax* (4) followed);

(ii) the machinery was subsequently used for the purpose of a trade consisting of the manufacture of goods and materials;

(iii) certain of the machinery was in replacement or substantial replacement of machinery previously used in the existing trade of the appellant.

Judgment for the appellant.

Cases referred to in judgment:

(1) *R. v. Wheeler* (1819), 2 B. & Ald. 345; 106 E.R. 392.

(2) *Ralston v. Smith* (1865), 11 H.L. Cas 223; 11 E.R. 1318.

(3) *McNicol & Another v. Pinch*, [1906] 2 K.B. 352.

(4) *K. Ltd. v. The Commissioner of Income Tax* (Kenya High Court Civil Appeal No. 19 of 1967) (unreported)).

(5) *Commissioner-General of Income Tax v. Kiganga Estates Ltd*., [1968] E.A. 464.

Judgment

Trevelyan J: The appellant company claimed an investment allowance, reduced by consent to £10,333, in respect of the year of income 1965, under para. 27(1) (*e*) of the Second Schedule (Part V) of the East African Income Tax (Management) Act 1958 for some machinery which it purchased and installed in its premises in Nairobi. The Commissioner-General disallowed its claim and, following such disallowance, the appellant company appealed to this court. I have not found it easy to arrive at a decision because the only witness was confused at times and the provision of the law with which this appeal is primarily concerned, i.e. the aforesaid paragraph, is not, in my view, very well drawn. However I am of the opinion that this appeal partly succeeds and I can only trust that I have arrived at the correct decision.

Paragraph 27 reads:

> "(1) Subject to this Schedule, where –
>
> (*a*) a resident person carrying on the business of a shipowner incurs capital expenditure . . . on the purchase . . . of any power driven ship . . .
>
> (*b*) a person incurs capital expenditure . . . on the construction of an industrial building . . . commenced after the 5th June 1962 but before the 12th June 1963 and which is used . . . for the purpose of a trade which consists in the manufacture of goods or materials (but not for . . .) and on the purchase and installation of machinery in such building . . .
>
> (*c*) a person incurs capital expenditure . . . on the construction of an industrial building where such construction commenced after the 11th June 1963 and which is used by him or by a lessee . . . and on the purchase and installation of machinery . . .
>
> (*d*) a person incurs capital expenditure . . . on the construction or extension of a building subsequently in use as an hotel . . .
>
> (*e*) the owner or lessee of a building incurs after the 16th June 1964, capital expenditure . . . on the purchase and installation of machinery in such building which building and machinery is subsequently used for the purposes of a trade which consists in the manufacture of goods or materials . . ., and such expenditure has not been incurred substantially for the replacement of machinery previously in use in an existing trade carried on by such owner or lessee

there shall be deducted in computing his gains or profits for the year of income in which the ship or building, or extension or machinery is first so used, a deduction . . ."

There are three issues which have been framed and need to be answered: whether the appellant company's premises are a building within the meaning of sub-para. (*e*); if they are such a building, was the building and the machinery in question (after its purchase and installation) used for the purposes of a trade consisting of the manufacture of goods and materials; and, if so, was the said machinery in replacement or in substantial replacement of machinery previously used in the existing trade of the appellant company.

I do not doubt that the premises were such a building. The respondent argues that as the words are "a building" and not "any building" they must, having regard to the other sub-paragraphs, be read as "a non-industrial building" so that the sub-paragraph does not apply to it since, when the machinery was installed, the building was already in use as an industrial building. There is much against this contention. Each sub-paragraph caters for a different set of circumstances as I now demonstrate: (*a*) deals with ships; (*b*) restricts itself to certain dates now long since past and to certain trades only, says that it is concerned only with "an industrial building" and speaks of outlay by an owner of premises only; (*c*) applies to the "construction of an industrial building" as well as to the purchase and installation of machinery and also speaks of outlay by the owner of premises only; (*d*) draws a distinction between the construction and extension of a building (and is the only one to refer to an extension) concerning itself only with hotels; whilst (*e*) restricts the outlay to machinery whether it be by the owner or lessee of premises. The final, omnibus part of the paragraph, beginning with the words "there shall be deducted", supports, as I think, what I have just said by its threefold use of the

disjunctive "or". It says "the ship or building or extension or machinery" and seems, thus, to take the sub-paragraphs in order. There are earlier references to machinery, but the expression "or machinery' after the words "or extension" at least suggests that "or extension" refers to (*d*) and "or machinery" to (*e*).

This is a taxing statute and if sub-paragraph (*e*) was intended to refer only to a non-industrial building it should have said so. There is no case for writing in words. The provision means, and I think must mean, that if the owner or lessee of a building purchases and installs some machinery in that building and thereafter uses that building and machinery for a trade, then, subject to the matter of replacement, the deduction is there for the taking. I do not see that it matters whether the building was or was not used for such trade before then. I believe that a strong enough case could indeed be made out in support of the view that the sub-paragraph was primarily aimed at a building which was previously used for the same business and trade because of what is said about replacement. The most likely place for it to be effected is where the replaced machines were installed. There is also this, that the expression "existing trade carried on by such owner or lessee" relates back, as I believe it must relate back, to the words "the owner or lessee of a building", and I cannot myself accept that one must have to own or be the lessee of two buildings to be able to take advantage of the deduction. Full weight must be given to the word "such". If, to make sense, words needed to be added to the sub-paragraph, they would be "in the said building" after "existing trade carried on by such owner or lessee". What interested the draftsman was the purchase and installation of machinery in a building for subsequent user for the purposes of a manufacturing trade. I derive more than a little comfort from two judicial dicta. In *K. Ltd. v. The Commissioner of Income Tax* (Kenya High Court Civil Appeal No. 19 of 1967) (unreported) Rudd, J., said:

> "In the case of machinery under paragraph (*e*) the position is even clearer because under that paragraph the building need not be an industrial building before the machinery is installed and in use. Paragraph (*e*) refers to the installation of machinery in a building whether it be an industrial building or not. Where in effect the building becomes an industrial building when the machinery is installed and put in use even if it was not previously an industrial building."

And in the appeal from Rudd, J.'s decision, Sir Charles Newbold, P., in *Commissioner-General of Income Tax v. Kiganga Estates*, [1968] E.A. 464 said:

> "Before a person is entitled to an investment allowance under paragraph 27 (*c*) or (*e*) in respect of capital expenditure, whether that expenditure be on the construction of an industrial building or the purchase and installation of machinery in a building . . ."

Rudd J: clearly thought that the building for sub-paragraph (*e*) might or might not before then have been an industrial building, while the learned President surely had in mind that (*c*) uses the words "industrial buildings" and that (*e*) does not. I think, indeed, that he draws a further distinction between the scope of the two sub-paragraphs when he says "whether that expenditure be on the constructing of an industrial building or on the purchase and installation of machinery".

I am satisfied that when the machinery was installed in the building after the purchase of the former it was used for the purpose of the appellant company's trade of manufacturing goods and materials. The respondent contends that the words "subsequently used' in sub-paragraph (*e*), whether read alone or with the words "first so used" in the final part of the paragraph, mean that both the building and the machinery must not have been in use before the

installation of the latter. I have said something about the building. But the machinery cannot have been used before, except by someone else, because it had been purchased, and, in any event, the expression "which building and machinery is subsequently used" cannot, with respect, mean what the respondent suggests. It simply indicates that when the machinery is installed something more remains before the deduction can be claimed, that is its use in the building. I recognise that the words are "which building and machinery" and not "which machinery", but I do not think that to be against my view though I confess that the words "building and" seem surplusage to me. As for the argument that "subsequent user must be for the first time", I cannot with all respect see why it must be so, nor do the words "for the first time" support the respondent. They do not appear in sub-paragraph (*e*) itself but in the following, omnibus part of the paragraph. As I see it they apply, and clearly apply, to the words "the ship or building or extension or machinery" which they follow. The disjunctive "or", used as I have said, leaves no room for doubt, or so I believe. It is the machinery, purchased and installed, which must first be used by the owner or lessee, not the building.

In regard to this same issue the respondent argues, though with less fervour than elsewhere, that trading in the nature of manufacture has not been established. But upon the evidence it has. It is, I suppose, a matter of degree as to when a maker becomes a manufacturer, for it is the facts of any given case that must be considered. Reading the facts before us, I do not think that there is any room for doubt. No useful purpose will be served by my setting out judicial dicta on the point, so I will refer to three cases that I looked at and leave it at that: *McNicol and Another v. Pinch*, [1906] 2 K.B. 352; *R. v. Wheeler* (1819), 2 B. & Ald. 345; 106 E.R. 392; and *Ralston v. Smith* (1865), 11 H.L. Cas. 223; 11 E.R. 1318.

The remaining question is whether or not certain machinery was or was not in replacement of some machines previously in use. It is agreed that we need only concern ourselves with two machines costing about £21,397 and £9,388 out of a total expenditure of £50,767 and I will deal with the facts about them in a moment. There is a large measure of agreement as to the law, respondent's counsel believing that we must find out whether there was "a substantial takeover of the work of the previous machines", while counsel for the appellant company thought that the question was simply whether the newly acquired machines were so acquired to replace existing machines or to be additions. One counsel said that we must consider all the relevant facts over a period of time while the other said that we must look at the purchase, installation, user and presence or absence of intent or purpose in relation to the replacement or otherwise of previous machines. He put it that one must consider whether the object of the expenditure "was for this or for that".

The sub-paragraph says:

> "and such expenditure has not been incurred substantially for the replacement of machinery previously in use in an existing trade . . ."

I found the word "for" rather troublesome. Was it inserted so that all that needed to be looked at is the initial reason for the purchase? If so, one might well echo the oft-quoted comment of Brian, C.J., in 1477 (Y.B. 17 Ed. IV fo. 2):

> "for it is common knowledge that the intention of man will not be probed, for the Devil does not know man's intention."

If that is why the word "for" was put in, it could lead to absurdity for it would mean that if the machinery was bought – there is no mention of installation – to replace existing machinery but was then used as

additional machinery no valid

claim could be made, but if it was bought as additional machinery and then used in replacement such a claim could be made. The statute is, of course, a taxing one, but there are also the words “has not been incurred” rather than “was not incurred” and I think that one must, therefore, consider the matter both prospectively and retrospectively or, as counsel put it, with both foresight and hindsight.

To understand the contest about the two machines two trails must be followed, that to do with their purchase and installation and the cesser of user of two other machines, and the other relating to formation of separate companies elsewhere than in Kenya. One of the machines was new when purchased and is referred to as “the new Roland”, and the other was in a reconditioned state when bought and is referred to as “the reconditioned Roland”. The two machines which it is said they replaced, and which I believe they did replace, will be referred to as “the Manns” or “the 2 Manns”.

An option to purchase a Roland machine (the word “option” being there used in a non-legal sense) was taken late in 1963 and, in pursuance thereof, a formal order for the new Roland was placed on October 19, 1964. It arrived in March 1965 and was installed, or installation was completed, in July, some three or four months later. The reconditioned Roland was not bespoken. It was ordered on May 12, 1965, arrived in the November then following and was installed, or installation was completed, in the following month. Both machines were put to use on installation. The two Manns were kept in use until being dismantled, one in February and the other in May 1966 and they were sent to Uganda in the August of that year.

Somewhere about the beginning of December 1964 the appellant company’s managing director asked for a report as to the opening, in Uganda, of a separate company to take over its Uganda business. The report was to be made ready and was so made ready within about two weeks. It is not, I think, unfair to suppose that not a great deal of time elapsed between the managing director deciding that he wanted the report and his request for it. The idea behind the idea was that sooner or later political pressure was likely to be applied and felt. The decision to go ahead with the formation of the company was, I think, taken on March 19, 1965, and incorporation taking time, and here apparently taking its time, the company came into existence in January 1966 – I do not think we have the actual date in evidence. The Uganda factory was not opened until April 1967. Less turns on the incorporation of the Tanzania company, but the idea is said to have originated on September 7, 1965, the company being incorporated about the same time as the Uganda company.

From the foregoing there is no question of other companies being in contemplation when the option was taken on a Roland machine and the new Roland was ordered a month or two before the managing director asked for the report. The dates are very close together but let it be accepted that the order was initially given to expand the appellant company’s business. The next thing must have been a consideration of the report, after which the policy decision was taken on March 19, 1965. Perhaps – there is no evidence one way or the other – the date of delivery was notified to the appellant company between October 19 and March, 1965, but be that so or not the new Roland arrived at about the time when the policy decision was taken. It is not possible to conclude that the matter of machinery was not canvassed when the question of new companies was being pondered on. What did the appellant company intend? It says that the two machines were not for replacing existing machines. Let us see.

It is to be recognised that the two Rolands were put to work side by side with the existing machines, but this went on only until shortly after the two

new companies were incorporated, one machine being dismantled in the following month and the other about three months later. There was no case that could have been made out for not putting all the machines to work until the new companies took over the work that they were capable of doing in their territories. It would have been poor business practice to have left any machine unnecessarily idle: space was available. There was, as we know, a time when the appellant company, hitherto catering for various territories from its premises in Kenya, thought it politic to open new business to be operated by new companies in the neighbouring territories, and it could not have left out of calculation that, as a result, its own business would be less. I do not see that, however early that might have been, it could have been later than when the policy decisions were taken – indeed, it was more likely before the time that the report was requisitioned. It is true that we have heard that the appellant company sought to expand, and did expand, its business but we heard nothing of any compensatory business which it anticipated would offset the business it would lose when the new factories began to operate. There is evidence that when the appellant company did lose trade to the other countries it indeed had less work to do. Evidence was led that when the Uganda and Tanganyika trade was lost not all of the machines could be put to work. The witness went so far as to say that the two Manns were sent to Uganda "to do the work we were no longer going to have from Uganda because we thought at the time that the Uganda government was going to restrict our ability to supply Uganda from Kenya". The words "going to have" are not without some little importance for they seem to indicate, though I need not rely on this, that the matter was in mind before the policy decision was taken. The appellant company seems well organised from what we have heard (and, if I may say so, seen); it is of fair size, it has its own costing section, it takes policy decisions and seems forward-looking.

There were good reasons for having the Roland rather than the Mann machines in Nairobi for they are "flexible", which the Manns are not, they have a greater output and efficiency and, as the witness put it, "out of the seven machines we sent the two Manns to standardise what we had".

The appellant company says that when the two Manns were dismantled their work was taken over by the two Rolands. That is understandable for the Manns were of no use until re-assembled in Uganda. I do not think that we were told how long the extra shifts were operated but we were told that "the Rolands did not replace the Manns. The work done by the Manns was *temporarily* taken over by the Rolands by the extra shift" and "initially we extended the shifts to two of 12 hours each. Then we used staff recruited for Uganda and got the shifts back to seven hours. There were then three shifts a day. This is in relation to the two Rolands in this case." It seems, then, that the capacity of the remaining machines was enough for Kenya at that time.

I do not apprehend that this court is bound by views expressed in correspondence or in evidence as to whether there was or was not a replacement, but it is for note that Mr. Horsburgh (though he was not in Kenya when the two Rolands were installed) wrote, and he would not have written without some research or enquiry of some kind, that:

> ". . . the Reconditioned Roland machine could be classed as a part replacement, because this replacement was necessary, due to the existing machine, a Mann Q/D 2-colour. The output from the Roland is far superior to the Mann and due to the flow of work in Nairobi, it was necessary to buy this machine and send the older and slower machine to Jinja where it will be adequate for some years to come."

The statute does not, I think, deal with "part-replacements" – fortunately so

as it is not a precise definition – but contents itself with speaking of expenditure incurred substantially for replacement. With due respect to a man who has not had the chance of giving an explanation, Mr. Horsburgh has put up, perhaps, a better case for replacement rather than part-replacement. But whether that is so or not, when the witness was asked, "When you placed the order of it (i.e. the reconditioned Roland) in May 1965 were you buying it for the appellant company or to free one to go to Uganda?" he answered, "We were giving ourselves the same capacity intending to send one to Uganda." That, to me, leaves no room for speculation. But if it does, there are the other factors which I have touched upon.

There was, as I have mentioned, just one witness in the appeal. It is difficult to see what evidence the respondent could have called. But I have no doubt that when the probabilities are weighed they come down firmly on the side of replacement. Indeed I have no doubts that the machines were purchased and installed to replace other machinery. And, in any event, it was for the appellant company to prove that there was no replacement and this they have not done.

I answer the issues as follows: (1) Yes; (2) Yes; (3) The new Roland and the reconditioned Roland were in replacement of machinery previously in use but the remainder of what was purchased and installed was not – this was not in dispute. I tried to see how the figure of £10,333 was arrived at for it is not one-fifth of the total outlay of £50,767 but I could not do so. My arithmetic provides me with figures of approximately £6,157, which cannot, and £4,176, which can be deducted by way of investment allowance under paragraph 27 (*e*). I am prepared to adjust these figures if they are wrong but subject to that the appeal succeeds in respect of the latter figure but not as to the other. I am to hear counsel on the issue of costs.

For the appellant:
JA Mackie-Robertson, QC and *PJS Hewett*
Daly & Figgis, Nairobi

For the respondent:
M Muli (Deputy Counsel to the East African Community)
Counsel to the East African Community

Misango v Republic
[1969] 1 EA 538 (HCT)

Division:	High Court of Tanzania at Mwanza
Date of judgment:	5 March 1969
Case Number:	1/1969 (80/69)
Before:	Seaton J
Sourced by:	LawAfrica

[1] Criminal Practice and Procedure – Irregularity – Judgment – Substantial part of judgment written before evidence concluded – Whether irregularity.

[2] Criminal Practice and Procedure – Judgment – Meaning of – Whether summary of evidence written by magistrate during trial is a judgment – Criminal Procedure Code (*Cap.* 20), *ss.* 170 *and* 171 (*T.*).

Editor's Summary

The appellant was charged on 24 counts, 12 of forgery and 12 of stealing by a servant. The trial commenced on September 28, 1968, and there were numerous adjournments. Between November 15 and 25, 1968, defence counsel requested and was granted permission to peruse the case file. Defence counsel saw in the case file a sheaf of paper which was headed "Judgment" and accordingly on November 25, 1968, submitted that, as the magistrate had already started writing his judgment, the defence was prejudiced and no more witnesses could be called. The magistrate ruled against the submission. The case then proceeded with the prosecution calling two more witnesses who were not cross-examined by the defence. The appellant was convicted on all 24 counts. On appeal it was contended that the magistrate had prejudged the issues; that the further prosecution evidence was admitted to bolster and fill in the gaps in the prosecution case to the prejudice of the appellant; and that because of these irregularities the conviction should be quashed. On appeal:

Held -

(i) a judgment is not a judgment until it is reduced to writing and delivered in open court;

(ii) the magistrate did not prejudge the case before the close of the prosecution case, and the sheaf of papers on which he had written constituted his rough notes or summary of the evidence and to this extent he had committed no irregularity;

(iii) in the later part of his judgment, which he wrote after making his ruling on defence counsel's submission, the magistrate did not treat the evidence with that degree of consideration which is required by ss. 170 and 171 of the Criminal Procedure Code; and in the interests of justice there should be a retrial.

Retrial ordered.

Cases referred to in judgment:

(1) *Thomas Makuru s/o Marwa v. R.* (Court of Appeal Criminal Appeal No. 198 of 1965) (C.A.E.A. Digest, June, 1966).

Judgment

Seaton J: Appellant was charged on 24 counts: 12 of forgery and 12 of stealing by a servant. The trial commenced on September 28, 1968, and there were numerous adjournments. Between November 15 and 25, 1968, defence counsel requested and was granted permission to peruse the case file so that he might refresh his memory as to the evidence that had been given. At this stage of the trial, seven prosecution witnesses had already been heard.

Defence counsel saw in the case file a sheaf of papers which was headed “judgment” and accordingly, on November 25, 1968, submitted that as the learned magistrate had already started writing his judgment, no more witnesses could be called. He said the defence felt that it was prejudiced by this action of the learned magistrate; the prosecution could no longer withdraw from the case and charge the accused afresh.

The learned magistrate ruled against this submission and stated:

> “The flagged papers cannot be called judgment in conformity with the provisions of sections 170 and 171 of the Criminal Procedure Code; as the document itself is a mere summary of the charge and the brief summary of the evidence for the prosecution up to P.W.7. There is no decision on it. Had it been a judgment no doubt the papers of the so-called judgment would have been coupled with these proceedings on the left hand side but instead they have been filed like ordinary correspondence on the right hand side of the file.”

He went on to say:

> “On whatever may we call what had happened an error, irregularity or anything; in my mind, such a thing has not in any way prejudiced the accused nor has it occasioned a failure of justice.”

The case then proceeded with the prosecution calling two more witnesses who were not cross-examined by the defence. After the close of the prosecution case, the defence made no statement and called no witnesses. On November 29, 1968, the learned magistrate gave judgment convicting the appellant on all 24 counts.

In his memorandum of appeal the appellant complains that it was irregular for the magistrate to write a substantial part of the judgment before the close of the prosecution case. He further contends that the learned magistrate admitted more prosecution evidence to bolster or fill up gaps in the prosecution case to the prejudice of the appellant and that the learned magistrate had pre-judged the issues in the case before calling upon the appellant in terms of s. 206 of the Criminal Procedure Code. As a result of all these irregularities, he submitted that the appellant did not have a fair and impartial trial and the conviction could not be upheld.

Learned State Attorney, in supporting the conviction, submitted that the learned magistrate merely made notes and summarised the evidence for the prosecution before the conclusion of the prosecution case and this by itself could be no sufficient ground for a complaint. Learned State Attorney has also pointed out that what the learned magistrate had written up to November 25, 1968, in the sheaf of papers, although headed “judgment”, did not constitute a judgment within the terms of ss. 170 and 171 of the Criminal Procedure Code. With these submissions, I would respectfully agree. A judgment is not a judgment until it is reduced to writing and delivered in open court. After the learned magistrate had given his ruling and heard the evidence of the remaining two prosecution witnesses, he should then have proceeded to consider the points for determination in the case, recording his decision or findings and his reasons for those findings.

In the present case, however, after the learned magistrate made his ruling on defence counsel’s submission, he seems to have proceeded immediately to state his findings of fact. He does not appear to have weighed the prosecution evidence. He has set it out and stated he has accepted it but has not given his reasons for doing so.

For example, with regard to counts 13 and 14, the learned magistrate had

pointed out that one Joha d/o Seffu, who was supposed to have paid Shs. 50/- for pombe fees on February 12, 1968, was not called to give evidence but the receipt she was alleged to have received was put in evidence by Constable Hassani as exhibit 15. This was pointed out in the evidence of or the notes of the learned magistrate before learned counsel saw them. In the part of the judgment which was written after defence counsel saw the notes, the learned magistrate referred to the evidence on counts 13 and 14 and commented:

> "The fact that the said Joha was not called in to give evidence is immaterial, on perusing the receipt itself and its duplicate; and in the absence of any explanation to the contrary."

Again, with respect to counts 23 and 24, the learned magistrate had commented before the defence counsel saw the notes or summary of evidence that:

> "It is surprising to note that P.W.1 Sefu Nziku was not questioned about the Shs. 100/- he was alleged to have paid to the appellant for pombe fees by the prosecution during his examination-in-chief, but the stakabadhi was put in as exhibit 11."

In the part of the judgment which was written after the defence counsel saw these notes or summary of evidence, the learned magistrate has commented, with regard to counts 23 and 24:

> "Although as I have said earlier that Sefu was not examined by the prosecution as to the accused's receipt of Shs. 100/- as per stakabadhi No. 337608, exhibit 11, it is clear from the original stakabadhi that the accused had received that sum of money. He falsely showed on its duplicate that he had received Shs. 2/- only and that he had spent the difference himself – he the accused."

From a perusal of the record of the case, it appears that John Lyamgombe was alleged to have paid money for pombe fees to the appellant and to have received the original. These original receipts did not correspond in the names of payees and in amounts paid or reasons for payment with the duplicates, e.g. stakabadhi No. 75358 of January 20, 1968, showed Shs. 100/- paid on the original and was in the name of John Lyamgombe but the duplicate showed a different name and was for the lesser amount of Shs. 20/-. Then stakabadhi No. 75359 was for Shs. 50/- on the original and in the name of Lyamgombe but the duplicate was in a different name and showed a lesser amount of Shs. 20/-. However, Lyamgombe himself did not pay these sums of money to the appellant. He sent his child with the money to obtain the licence and his child returned the stakabadhi to him. The child himself was not called to give evidence. Similar comments may be made about other sums of money in respect of the other counts in the charge.

The learned magistrate relied for his findings of fact on the identification of the appellant's signature and handwriting on the original and duplicate receipts of stakabadhi by two clerks who had worked with the appellant for long periods of time since 1963 and who stated that they were familiar with his handwriting and signature. The learned magistrate, after making his ruling on defence counsel's submission as to the part-written judgment of November 25, 1968, dealt with the evidence as to the handwriting and signature by stating:

> "I am satisfied that all the receipts exhibited before this court were written by the accused and signed by himself, that they differ from their duplicates. And that the accused received sums of money shown in the original stakabadhi and converted to his own use the difference on the original and the duplicate."

Upon a consideration of the judgment as a whole, this court is left with the impression that the learned magistrate did not prejudge the case before the close of the prosecution case and that the sheaf of papers on which he had written constituted his rough notes or summary of the evidence and to this extent he committed no irregularity. However, in the latter part of his judgment which he wrote after making his ruling on defence counsel's submission, the learned magistrate does not appear to have treated the evidence with that degree of consideration which is required by ss. 170 and 171 of the Criminal Procedure Code.

Reference has been made to the case of *Thomas Makuru s/o Marwa v. R.* (Court of Appeal Criminal Appeal No. 198 of 1965) (reported in the Digest of the Decisions of the Court of Appeal for East Africa for June 1966). In that case it was held that a judgment based only on the prosecution evidence was so irregular and incurable as to involve a failure of justice. I would agree with the learned State Attorney that the case may be distinguishable from the present case because in the case cited there had been evidence for both the accused and the defence whereas the trial judge only considered the evidence of the prosecution case. In the present case there was no defence evidence but there had been vigorous cross-examination of prosecution witnesses and the learned magistrate was under the obligation, despite the lack of a statement from the defence, to weigh carefully the prosecution evidence and to give reasons for accepting it.

In all the circumstances of this case, I am of the view that the judgment did not adequately comply with the provisions of ss. 170 and 171 of the Criminal Procedure Code and that in the interests of justice there should be a re-trial. I have come to this conclusion reluctantly because the serenity of the learned magistrate may have been somewhat disturbed by the course which learned defence counsel felt he was obliged to adopt after seeing the part-written judgment or summary of evidence on November 25, 1968. Upon the view which I have taken of the case, it is unnecessary for me to pronounce upon the sentence imposed, which defence counsel submitted was excessive.

The appeal is accordingly allowed. It is ordered that there should be a re-trial of the appellant at the earliest opportunity on appropriate charges before another magistrate.

Order accordingly.

For the appellant:
RWG Rugarabamu
RWG Rugarabamu, Mwanza

For the respondent:
DS Ngala (State Attorney, Tanzania)
Attorney-General, Tanzania

Kingombe v Republic
[1969] 1 EA 542 (HCT)

Division: High Court of Tanzania at Mwanza

Date of judgment: 28 March 1969

Case Number: 67/1969 (81/69)

Before: Bramble J

Sourced by: LawAfrica

[1] Traffic – Disqualification – "Special reasons" – Necessity of evidence to support.

[2] Traffic – Disqualification – "Special reasons" – Vehicle driven uninsured – Vehicle being tested after repair – Whether "special reasons" for not disqualifying – Motor Vehicle Insurance Ordinance (*Cap.* 169), *ss.* 4 (1) *and* (2) (*T.*).

Editor's Summary

The appellant was convicted of driving a motor vehicle on a public road without third party insurance c/s 4 (1) and (2) of the Motor Vehicle Insurance Ordinance. He was fined and disqualified from driving for 12 months. On appeal against the order of disqualification the appellant contended that the statement, in his plea in mitigation of sentence, that the vehicle was being tested after undergoing repairs, constituted "special reasons". On appeal:

Held –

(i) the "special reasons" relied on should as a matter of practice be supported by evidence rather than statements (*Jones v. English* (1) adopted);

(ii) it is a question of law whether the facts found by the court constitute "special reasons";

(iii) testing a vehicle after effecting repairs does not constitute "special reasons". In fact the risk to the public is greater with the uninsured vehicle under repair on the road (*Gardner v. James* (4) adopted).

Appeal dismissed.

Cases referred to in judgment:

(1) *Jones v. English*, [1951] 2 All E.R. 853.

(2) *Brown v. Dyerson*, [1968] 3 W.L.R. 615; [1968] 3 All E.R. 39.

(3) *Rennison v. Knowler*, [1947] 1 All E.R. 302.

(4) *Gardner v. James*, [1948] 2 All E.R. 1069.

Judgment

Bramble J: The appellant was convicted on his own plea of driving a motor vehicle on a public road without third party insurance contrary to ss. 4 (1) and (2) of the Motor Vehicle Insurance Ordinance. He was fined and disqualified from holding or obtaining a driving licence for 12 months. He has appealed against the order of disqualification on the ground that the statement in his plea in mitigation of sentence amounted to "special reasons".

His statement was that he was the owner of a motor vehicle for three years. From April 1968 to

December 1968 the vehicle was out of order and he could not get parts to repair it. In December 1968 he secured parts and repaired it himself. He was testing it on the road when he was stopped by the police and the vehicle carried a sign “On Test”. The insurance had expired in June 1968.

The relevant law in England previous to 1960 was the same as it is in Tanzania and the English decisions, while not binding, are persuasive. On the question of the procedure to establish “special reasons” it was held in *Jones v. English* [1951] 2 All E.R. 853 as follows:

> "Where on a plea of guilty or after evidence has been heard, a defendant has been convicted of an offence for which the penalty of disqualification is laid down by that of Parliament and he seeks to rely on special reasons for the non-imposition of disqualification, he ought to give evidence and the justices ought to hear evidence on the point and not merely accept statements. This is highly desirable because the onus is on the defendant to show special reasons why he should not be disqualified."

It was, however, held in *Brown v. Dyerson*, [1968] 3 W.L.R. 615 that:

> "Although evidence should be called to substantiate facts relied upon as constituting special reasons, failure would not invalidate the justices' decision if there was material capable of sustaining a finding of special reasons."

As a matter of practice I am of the view that special reasons should be supported by evidence rather than statements when the courts will better be able to find certain facts and determine whether or not they constitute special reasons.

The circumstances of this case fully illustrate the advisability of the procedure indicated above and the point is strengthened by the dictum in *Rennison v. Knowler*, [1941] 1 All E.R. 302, which reads as follows:

> "We are in agreement with the decisions given in Scotland that the question whether on the facts found by the court, it is open to the court to hold that special reasons exist is one of law."

The learned magistrate, however, would appear to have considered the facts as stated by the appellant and since there is no record that the prosecution did not disagree I will consider them as facts found.

The point in issue is whether testing a vehicle after repairs is a special reason to exempt the appellant from disqualification. I can do no better than refer to an English case *Gardner v. James*, [1948] 2 All E.R. 1069 in which the defendant was anxious to test a motor cycle which he had just bought and assembled himself. It had no insurance and the defendant pleaded guilty to a charge of using a motor vehicle without third party insurance. On appeal it was held that testing a vehicle in these circumstances did not constitute "special reasons" entitling the justices to refuse to suspend the licence. In this case the offence was a serious one exposing users of the road to great risks in that if they were injured they would get no compensation. The appellant was fully aware of the risk and the danger possibly was greater with a vehicle under repair and I cannot see how the fact that the vehicle was on test could be a mitigating factor to support the non-suspension of a driving permit. The appeal is, therefore, dismissed.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:
DS Ngala (State Attorney, Tanzania)
Attorney-General, Tanzania

Raphael v Republic
[1969] 1 EA 544 (HCT)

Division: High Court of Tanzania at Mwanza

Date of judgment:	7 March 1969
Case Number:	77/1969 (82/69)
Before:	Bramble J
Sourced by:	LawAfrica

[1] Criminal Practice and Procedure – Trial – Trial begun by one magistrate and concluded by another – Necessity for second magistrate to inform accused of his right to recall witnesses – Criminal Procedure Code (*Cap.* 20), *s.* 196 (*T.*).

Editor's Summary

The appellant was convicted of robbery with violence. The trial was started by one magistrate, who was transferred, and was then concluded by another magistrate. The second magistrate informed the accused that he had the right to recall and cross-examine any of the witnesses. On appeal:

Held –

(i) it is a prerequisite to the second magistrate's exercising jurisdiction that he should apprise the accused of his right "to demand that the witnesses or any of them be resummoned and reheard" under s. 196 of the Criminal Procedure Code;

(ii) if the second magistrate has not complied with this prerequisite it is fatal, he has no jurisdiction, and the trial is a nullity.

Order for a trial de novo by another magistrate.

No cases referred to in judgment

Judgment

Bramble J: In this case the appellant was convicted of robbery with violence contrary to s. 286 of the Penal Code and was committed to the High Court for sentence under the provisions of s. 5 of the Criminal Procedure Code. He has appealed against conviction.

The matter was started by a magistrate, who was transferred, and concluded by another magistrate. This is possible under s. 196 of the Criminal Procedure Code which has, however, the following proviso:

> "In any trial the accused may, when the second magistrate commences his proceedings, demand that the witnesses or any of them be resummoned and reheard and *shall be informed of such right by the second magistrate when he commences his proceedings*."

The prerequisite to the second magistrate's exercising jurisdiction is the informing of the accused of his right. The second magistrate in this matter informed the accused that he had a right to recall and cross-examine any of the witnesses. He did not, therefore, comply with the conditions stated in the proviso mentioned above.

Learned Senior State Attorney suggested that this was an irregularity and need not necessarily be fatal by virtue of s. 346 of the Criminal Procedure Code. I am, however, of the view that it must be fatal since

informing the accused of his right is a prerequisite for the second magistrate's assuming jurisdiction. If he has not complied with the law, he has no jurisdiction and the trial is a nullity. The Republic has conceded that since the decision of the learned magistrate indicates that he was influenced by the credibility of the witnesses

for the prosecution, the accused was materially prejudiced by not having an opportunity to get the witnesses to give their evidence before him. With that I agree.

As a result, I must allow the appeal, quash the conviction and order that the matter be tried de novo by another magistrate.

Appeal allowed. Retrial ordered.

The appellant in person.

For the respondent:
RH Kisanga (Senior State Attorney, Tanzania)
Attorney-General, Tanzania

Patel v Republic
[1969] 1 EA 545 (HCT)

Division:	High Court of Tanzania at Mwanza
Date of judgment:	31 January 1969
Case Number:	857/1969 (83/69)
Before:	Seaton J
Sourced by:	LawAfrica

[1] Contempt of court – Essentials of offence – Mens rea necessary to conviction – A person speaking without permission of court.

[2] Contempt of court – Procedure to be adopted – Penal Code (*Cap.* 16), *s.* 114 (*T.*).

[3] Contempt of court – Sentence – Option of fine must be given in summary proceedings for – Penal Code (*Cap.* 16), *s.* 114 (2) (*T.*).

Editor's Summary

In the course of judicial proceedings the appellant allegedly showed disrespect to the court by speaking without its permission. The appellant told a witness in attendance at the court "Wewe shahidi kaa huku" ("You witness, come and sit over here"), and was convicted of contempt of court c/s 114/(1) of the Penal Code. On appeal:

Held –

(i) intentional disrespect is an essential ingredient of the offence of contempt of court under s. 114 (1) of the Penal Code;

(ii) the magistrate did not direct his mind to the question of mens rea. This was a misdirection.

Observations as to procedure to be followed.

Appeal allowed. Conviction and sentence quashed.

Cases referred to in judgment:

(1) *Republic v. Dick*, [1964] E.A. 519.

(2) *Joseph Odhengo s/o Ogongo* (1954), 21 E.A.C.A. 302.

Judgment

Seaton J: The appellant was charged with contempt of court under s. 114 (1) of the Penal Code. The facts alleged against the appellant were that on November 1, 1968, within the premises of the Tabora District Court and in the course of judicial proceedings, he showed disrespect to the court by speaking without its permission. It appears that the appellant told a witness in attendance at the court "Wewe shahidi kaa huku" ("You witness, come and sit over here").

When the charge was read and explained to the appellant, he admitted that he had spoken without asking the permission of the court but said he did not know he had to do so. The appellant also admitted that he was wrong in not consulting the advocate who was representing him in the case for which he had come to court before communicating with his witness.

On these facts, the appellant was convicted and sentenced to one month's imprisonment. The record of the trial court is relatively brief and is reproduced in full below:

"1/11/68 Coram: F. L. Nyalali, R.M.

Inspector Mwakasege for Pros.

Accused present.

Proceedings instituted at 11.30 a.m. before court rises. Charge is read and explained to accused (in English). Plea of accused in his own words (in English): It is true that I said so and I did not ask permission from this court.

Court to Accused: Why did you not seek permission from me if you had anything to tell the witness?

Accused to Court: I did not know that I had to do so.

Court to Accused: Did you know that I as a magistrate was in charge of the court?

Accused to Court: Yes, I knew.

Court to Accused: You were represented by Advocate in the case for which you had come to court, why did you not consult your Advocate if you had anything to communicate to your witness?

Accused to Court: I was wrong.

Court: It is clear that accused knowing very well that Judicial proceedings were going on at the time chose to speak to a witness in attendance in court without permission from me and to speak about matters which were not connected with the proceedings over which I was presiding. It is evidence that accused deliberately ignored the presence of the court and chose to conduct his own matters and spoke in a very loud voice which interfered with the proceedings at hand and the proceedings had to stop as a consequence. Accused has not given a satisfactory explanation of his conduct and I must convict him of Contempt of Court c/s 114 (1) (*a*) of the Penal Code.

Sgd. F. L. Nyalali, R.M.

1/11/68.

Sentence: One month imprisonment.

Sgd. F. L. Nyalali, R.M.

1/11/68."

The petition of appeal raises a number of objections to the procedure adopted and also to the finding and sentence. Those relating to the procedure may be summarised as follows:

"1. If the learned trial magistrate intended to take cognisance of the alleged offence himself, he should have proceeded under sub-s. (2) of s. 114 of the Penal Code and not under sub-s. (1) (*a*) of the said section as he did.

2. The learned trial magistrate assumed unto himself the roles of complainant, witness, prosecutor and judge, in violation of the principles of natural justice."

In support of these objections, learned advocate for the appellant referred to the case of *Republic v. Dick*, [1964] E.A. 519. Learned State Attorney concedes that nowhere in the record is it expressly stated that the contempt of court proceedings were being held by virtue of s. 114 (2) of the Penal Code but he submits that so much may be inferred from a perusal of the record as a whole. It seems to me that the procedure followed by the learned magistrate substantially complied with that laid down in *Joseph Odhengo s/o Ogongo* (1954), 21 E.A.C.A. 302 and that the principles of natural justice were not violated.

The objection as to the finding or as to the merits of the appeal was that the admitted facts did not constitute the offence charged.

It is clear from the above judgment that the learned magistrate did not direct his mind to the question of mens rea. This appears to me to have been a misdirection. Section 114 (1) of the Penal Code makes it an offence if any person "(*a*) within the premises in which any judicial proceeding is being had . . . shows disrespect, in speech or manner, to or with reference to such proceeding, or any person before whom such proceeding is being had or taken." The emphasis in that subsection seems to lie on the intention of the accused in doing the act complained of. This emphasis may not be so clear in the common law offence of contempt of court which is defined in Archbold (at para. 3471, 35th Edn.) as follows:

> "The essence of contempt of court is action or inaction amounting to interference with or obstruction to, or having a tendency to interfere with or to obstruct the due administration of justice."

And it may be that this distinction could be given effect by the High Court in exercising its powers under s. 114 (3) of the Penal Code. But learned State Attorney has conceded that intentional disrespect is an essential ingredient of the statutory offence in Tanganyika and I think this is clearly shown if sub-s. (1) of s. 114 is read as a whole including sub-s. (1) (i), which makes it a crime if any person

> "commits *any other act* of intentional disrespect to any judicial proceeding, or any person before whom such proceeding is being had or taken" (italics added).

There was no evidence in the present case of any intention on the part of the appellant to show disrespect and had the learned Resident Magistrate directed his mind to this aspect of the matter, I have no doubt he would not have come to the conclusion that the appellant was guilty of contempt of court as charged.

That is sufficient to dispose of the appeal but I should observe that even had the conviction been justified, the sentence imposed was improper. When contempt of court proceedings are in the summary form authorised by s. 114 (2) of the Penal Code, a sentence of imprisonment cannot be imposed save in default of a fine. In the present case no option of a fine was given. Although the appellant has already completed serving his sentence, for the sake of the record, the appeal is allowed, the conviction quashed and the sentence set aside.

Order accordingly.

For the appellant:
CC Patel
CC Patel, Mwanza

For the respondent:
RH Kisanga (Senior State Attorney, Tanzania)
Attorney-General, Tanzania

Nyali Ltd v Municipal Council of Mombasa
[1969] 1 EA 548 (HCK)

Division:	High Court of Kenya at Mombasa
Date of judgment:	30 July 1968
Case Number:	6/1967 (84/69)
Before:	Mosdell J
Sourced by:	LawAfrica

[1] Rating Law – Improvement – Survey – Whether demarcation by survey an improvement – Valuation for Rating Act (*Cap.* 266), *s.* 9 (*K.*).

[2] Rating Law – Improvement – Roads – Whether roads are improvements – Valuation for Rating Act (*Cap.* 266), *s.* 9 (*K.*).

[3] Rating Law – Rateable property – Roads – Whether roads rateable property – Valuation for Rating Act (*Cap.* 266), *s.* 9 (*K.*).

[4] Rating Law – Rateable unit – Whether land one or more rateable units a question of fact – Principles to be applied.

Editor's Summary

The appellant owned a large estate near Mombasa and had prepared this estate for development by preparing a sub-divisional scheme, obtaining approval of it, surveying the sub-divisions (which involved the laying of beacons) and making roads. The valuer appointed under the Valuation for Rating Act valued the sub-divided plots separately. On the objection of the appellant the Valuation Court valued the whole estate as a single rateable unit. On appeal by the Council the magistrate ordered that the sub-divisions be valued as separate rateable units. The appellant appealed to the High Court.

Held –

(i) survey and the consequent placing of beacons constitute improvements (*Nairobi City Council v. Nairobi City Valuation Committee and Commissioner for Lands* (7) not followed);

(ii) public and private roads are not rateable property nor are they improvements;

(iii) when any property is sub-divided the sub-divisions must be valued as separate rateable units;

(iv) whether premises form one unit for rating purposes is a question of fact (*Municipality of Mombasa v. Nyali Ltd*. (6) followed);

(v) on the facts, the premises formed one unit for rating purposes (*Municipality of Mombasa v. Nyali Ltd*. (5) followed; *Nairobi City Council v. Nairobi City Valuation Committee and Commissioner of Lands* (7) not followed).

Observations on the considerations to be applied in deciding on whether premises form one unit for

rating purposes.

Appeal allowed.

Cases referred to in judgment:

(1) *North Eastern Ry. Co. v. Guardians of York Union*, [1900] 1 Q.B. 733.

(2) *Spillers Ltd. v. Cardiff Assessment Committee*, [1931] 2 K.B. 21.

(3) *Glasgow University v. Assessor for Glasgow*, [1952] S.C. 504.

(4) *Gilbert v. S. Hickinbottom and Sons Ltd*., [1956] 2 Q.B. 40.

(5) *Municipality of Mombasa v. Nyali Ltd*. (Kenya High Court Civil Appeals Nos. 20 and 21 of 1960) (unreported).

(6) *Municipality of Mombasa v. Nyali Ltd*., [1963] E.A. 330.

(7) *Nairobi City Council v. Nairobi City Valuation Committee and Commissioner for Lands*, [1966] E.A. 57.

Judgment

Mosdell J: This is an appeal from the decision of the Senior Resident Magistrate, Mombasa dated August 11, 1967, in consolidated Civil Appeals Nos. 1 and 2 of 1965 by Nyali Limited. The respondent to this appeal is the Municipal Council of Mombasa.

The two Civil Appeals Nos. 1 and 2 of 1965 were by the respondent from the decision of the Valuation Court on the objection of the appellant to the valuation in draft valuation roll for 1959 – 1961 (Civil Appeal No. 1) and in draft supplementary valuation roll for 1959 (Civil Appeal No. 2). The two rolls were prepared by the valuer under the provisions of the Local Government (Valuation for Rating) Ordinance (No. 18 of 1956) (hereinafter called "the new Act") which is now the Valuation for Rating Act (Cap. 266). The time of valuation of the properties in the said two rolls was October 1, 1957.

The appellant is the owner in fee simple of a large plot of land at Nyali. From time to time the appellant has sub-divided parts of this plot of land into smaller residential plots. This appeal concerns those plots set forth in the schedules attached to the memorandum of appeal. The valuer valued each plot separately. The appellant filed objections to the two rolls. The objections to the two rolls were heard on March 12, 1964, and December 9, 1964, and in respect of each roll the Valuation Court upset the method of valuation adopted by the valuer and decided to value the whole plot of land in each case as one rateable unit. The respondent appealed to the court of the Senior Resident Magistrate, Mombasa. On August 11, 1967 the Senior Resident Magistrate allowed the appeals and ordered that the sub-divisions should be valued as separate rateable units. It is from this decision that the appellant is now appealing. The grounds of appeal in the instant appeal are as follows:

"(i) The learned magistrate misapplied and erred in following the decision of the High Court of Kenya in *Nairobi City Council v. Nairobi City Valuation Committee and Commissioner of Lands*, [1966] E.A. 57, and in failing to recognise that that decision does not oust the authority of the decision of this Honourable Court between the present parties reported in [1963] E.A. 330 where that decision is appropriate to the facts of any case, as was so in the case before the learned magistrate.

(ii) The learned magistrate erred in failing to hold that the issue in the appeal as to whether the rateable unit was the unit of land registered as L.R. No. 67/R or the potential sub-divisions thereof was essentially a question of fact and that the Municipal Council had failed to show that the Valuation Court had applied any wrong principle and that there was no other ground in law for an appellate tribunal to disturb the Valuation Court's decision.

(iii) The learned magistrate erred in failing to hold that there was no evidence before him or the Valuation Court upon which he could find that the potential sub-divisions (which have not been registered as such) should be valued as individual rateable units.

(iv) The learned magistrate erred in failing to hold that section 4 (1) (*c*) of the Valuation for Rating Act (Cap. 266) had been wrongly construed in [1966] E.A. 57 and that the section refers only to sub-divisions which have been carried into effect and completed by registration in the Land Registry or, in the event of ambiguity, the Act being a taxing statute, should be construed liberally and in favour of the taxpayer.

(v) The learned magistrate erred in allowing the appeals before him and holding that the potential sub-divisions constituted individual rateable units and should be valued as such.

(vi) Alternatively the learned magistrate erred in failing to hold that it was not permissible to arrive at a higher value by supposing the creation of sub-divisions by registration."

The correct method of valuation in such a case as the present was considered by the Court of Appeal for East Africa in an appeal involving the same parties as are parties to the instant appeal and relating to land in the same area. The case is *Municipality of Mombasa v. Nyali Limited*, [1963] E.A. 330 (hereafter called the *Nyali* case). In the latter case it was held according to the headnote on page 331:

"(i) the survey and making of roads effected 'improvements' within the definition in the Ordinance and must be regarded, for the purposes of valuation, as if they had not been made;

(ii) whether premises form one hereditament for rating purposes is a question of fact and the court could not interfere with the judge's finding on this issue unless he had erred in principle, which the court could not say he had."

The *Nyali* case was decided on the law obtaining under the Local Government (Rating) Ordinance (Cap. 137) (hereinafter called "the old Act"). Changes in the law of rating were made in the new Act and the basic issue in the instant appeal is whether or not these changes are of such a character as to render the decision in the *Nyali* case inconclusive in so far as the issues in this appeal are concerned.

As I understand the decision in the *Nyali* case, the court there held:

"(1) that as a survey, laying of beacons and the making of roads effected 'improvements' as defined in the old Act they must be regarded for the purposes of valuation for rating as if they had not been made. As the valuer is compelled to ignore improvements when valuing the land, and since a sub-divisional scheme is an improvement, he has to ignore the separate sub-divisions. Hence he must regard the land as un-sub-divided and hence he has no basis for saying that he will take separately as individual rateable units the sub-divided plots and the whole piece of land must be treated as one rateable unit; and

(2) that whether sub-divided land forms one hereditament for rating purposes or not is a question of fact with a decision on which an appellate court will not interfere unless the lower court erred in principle in reaching such decision."

Now in *Nairobi City Council v. The Nairobi City Valuation Committee and the Commissioner of Lands*, [1966] E.A. 57 (hereinafter called the Nairobi case) Farrell, J., was faced with the same problem in relation to Crown Land in Nairobi as that with which I find myself faced in the instant appeal and which I have referred to above as "the basic issue in the instant appeal". The headnote to the *Nairobi* case reads as follows:

"A block of Crown Land in Nairobi of an irregular shape was divided by survey into 116 potential plots and road reservations under an approved scheme. The unimproved value of each portion was assessed separately for rating purposes with an aggregate value in the draft supplementary roll for 1962 of Shs. 713,500/-. After objections being made by the Commissioner of Lands the Valuation Committee attributed a single value to the undivided land of Shs. 350,000/-, giving no reasons. The reduction in value was assumed to be due to the choice of the whole block as the rateable entity, a procedure derived from the *Municipality of Mombasa v. Nyali Ltd*.,

[1963] E.A. 330 (the *Nyali* case). On appeal to the Supreme Court the appellant contended that various amendments to the Local Government (Rating) Ordinance (Cap. 137) made after the date of valuation in the *Nyali* case required the assessments to be made on each potential plot. Such a contention assumes that demarcation under a scheme is not to be regarded as an 'improvement' thereby enabling the valuer to take account of the scheme when determining the size of the rateable unit as well as when assessing the unimproved value.

Held –

(i) the *Nyali* case (*supra*) must be regarded as a decision on a law that was no longer in force and as neither binding nor a safe guide on similar questions falling for decision under the existing law;

(ii) when assessing the value of unimproved land the existing law does not require that the demarcation of a scheme should be regarded as an improvement;

(iii) s. 4 (1) (*c*) of the Rating Act (Cap. 266) required the sub-divided plot to be taken as a rateable unit.

Appeal allowed. Order accordingly."

Under the new Act, therefore, Farrell, J., held that the demarcation of a sub-divisional scheme was not an improvement and that s. 4 (1) (*c*) of the Rating Act (Cap. 266) requires each sub-divided plot to be valued as a separate rateable unit. Concerning the alterations in the law made by the new Act Farrell, J., said this (and with such observations I respectfully agree):

"Of the definitions referred to, the definition of 'improvements' has been shortened, but not materially altered. The definitions of 'unimproved value' and 'value of improvements' have been removed from s. 2 and the meaning of the expressions is now to be sought in s. 9. There is an important change in the definition of 'rateable property' in so far as an exception is made in favour of 'any land used or reserved for roads, streets (including private streets)' etc.

Section 9 was further amended in 1957, and need not be considered at length. Sub-section (1) deals with the value of land, sub-s. (2) with the value of unimproved land and sub-s. (3) with the value of improvements. In each case the method of arriving at the value is set out. Whereas the definition of 'unimproved value' in the old law contained the words 'If the improvements, if any, thereon or appertaining thereto had not been made', sub-s. (2) uses instead the words:

> 'if the improvements, if any, thereon, therein or thereunder, had not been made.'

In the old law 'value of improvements' had been defined in s. 2 as follows:

> ' "value of improvements" in relation to any land means the added value which the improvements give to such land at the time of valuation irrespective of the cost of the improvements.'

Sub-section (3) of s. 9 in the existing law reads as follows:

> '(3) The value of improvements in relation to any land shall, for the purposes of a valuation roll or supplementary valuation roll, be the estimated replacement cost of the improvements on, in or under the land calculated as at the time of valuation, due regard being had to the suitability of the materials used and the works carried out and their age, depreciation and obsolescence.'

The only other change material to these proceedings which it is necessary to mention is that relating to sub-division of property.

In the old law s. 13 provided (*inter alia*) as follows:

> '13. Notwithstanding anything in this Ordinance contained, it shall be lawful for the local authority from time to time and at any time . . .
>
> (*c*) to cause a valuation to be made of any rateable property which is sub-divided after the date when the valuation in respect of such property has become final and to cause the valuation to be apportioned according to the sub-divisions of the said property, and to cause any rate due in respect thereof to be assessed and collected according to such sub-division.'

In the existing law the matter is dealt with in s. 4 as follows:

> '(4) (1). It shall be lawful for a local authority, either on their own initiative or at the request of any person from time to time and at any time to cause a valuation to be made as at the time of valuation of –
>
> (*c*) any rateable property which is sub-divided or consolidated with other rateable property; . . . and to include such valuation in a supplementary valuation roll as hereinafter provided.' "

What is the effect of these changes?

As to roads Farrell, J., said this (page 62):

> "Under the new law, roads, whether public or private, are excepted from the definition of 'rateable property', and if the present law had been in force at the time of the *Nyali* decision (1), it would not have been true to say that the roads were 'part of the original block', at any rate for the purposes of rating. If the roads are part neither of the undivided rateable property nor of the sub-divisional units, it is at least questionable whether they come within the definition of improvements 'on, in or under' the land, and if they merely appertain to the land, that is no longer sufficient to bring them within the definition."

I would go further. I would say that under the new law roads do not come within the definition of improvements 'on, in or under the land' and as they merely appertain to the land that is not sufficient under the new law to bring them within the definition.

As regards survey and consequent beacons Farrell, J., said this (page 63):

> "It is, of course, arguable that even if the roads are outside the definition of 'improvements', the beacons are an improvement; but it is open to doubt whether the court would have held that they alone amounted to an improvement. The conclusion of the court ([1963] E.A. at p. 342A) is that 'the roads and survey effected improvements and must be regarded, for the purpose of valuation, as if they had not been made'. It is, perhaps, not without significance that the beacons are not mentioned in that passage. So far as the survey is concerned it is true, as the court says ([1963] E.A. at p. 341 G), that 'there was work done on the land in the survey', but the reference to 'replacement cost of the improvements' in s. 9 (3) of the present Act, and the concluding words of the subsection viz. 'due regard being had to the suitability of the materials used and the works carried out and their age, depreciation and obsolescence', words which are new and not to be found in the old law – suggest that the improvements contemplated are something with physical characteristics and that under the new law the court might have been less ready to reject the submission of counsel

> for the rating authority ([1963] E.A. at p. 340I) that 'a survey with consequent beacons was not the type of physical feature which could be described as improvements'.
>
> In the light of these considerations it is in my view by no means certain that the Court of Appeal would have come to the same conclusion under the new law as it did under the old, in finding that the survey and making of roads effected 'improvements', and must be regarded for the purposes of valuation as if they had not been made."

Again, with respect, I agree with this conclusion. Yet in spite of the wording of s. 9 (3) in the new law it is arguable that a survey falls within the definition of improvements in the new law and that beacons are physical features within s. 9 (3). I myself would be prepared to regard a survey and the consequent placing of beacons (both under the old law and the new law) as improvements which must be disregarded by the valuer when valuing land.

We now come to the other relevant finding in the *Nyali* case to the effect that whether premises form one hereditament for rating purposes is a question of fact and an appellate court will not interfere with the finding of the lower court unless that court had erred in principle.

It was submitted by Mr. Inamdar for the respondent that the valuation court reached its conclusion at the respective hearings of the appellant's objections not as the result of hearing evidence but because the valuation court considered itself bound by the decision of the Court of Appeal for East Africa in the *Nyali* case. This, submitted Mr. Inamdar, left the question of fact still open. I agree. We then have to proceed to a consideration of the proceedings before the Senior Resident Magistrate in Civil Appeals Nos. 1 and 2 of 1965. He decided that the rateable unit should be the individual sub-divided plots. Subject to what I shall state in a moment about the *Nairobi* case unless he erred in principle in arriving at this decision I cannot interfere with it. Did he so err? He rightly held that he was bound by the decision in the *Nairobi* case. It cannot be said in my opinion that the Senior Resident Magistrate erred in principle in coming to his decision in Civil Appeals Nos. 1 and 2 of 1965 that each subdivision was to be treated as a separate rateable unit. However, as I have said, he was bound by the decision in the *Nairobi* case; I am not so bound. I regard myself as being able, therefore, in the circumstances, if necessary, to come to a conclusion different from that of the Senior Resident Magistrate.

And so we return to consideration of the question whether under the new law a survey and consequent placing of beacons amount to an improvement which has to be ignored and hence whether or not the land must be regarded as un-sub-divided. In view of the considerations previously mentioned herein I must, with respect, disagree with the conclusion of Farrell, J., that the changes in the new law rendered the decision in the *Nyali* case as to "improvements" inconclusive as to the issues in the appeal before him. I agree that s. 4 (1) (*c*) of the new law requires the sub-divided plot to be taken as the rateable unit as Farrell, J., appears to have found. But both s. 13 (*c*) of the old law and s. 4 (1) (*c*) of the new law appear to me to leave open the question when does a sub-division become a sub-division for rating purposes?

It appears to me that, even if a survey, and the placing of beacons, be held not to be improvements and hence do not have to be disregarded, these facts coupled with the fact that deed plans are in existence, all necessary consents have been obtained and the appellant is, as it were, poised at the ready to sell any of the plots to a purchaser, do not necessarily demand that each sub-divided plot be valued as a separate entity for rating purposes.

In the appeal from the decision in which the *Nyali* case was a second appeal

Edmonds, J., gave his reasons at some length for holding, contrary to the opinion he had previously held, that the land in question should be regarded as a single entity for rating purposes. In his judgment in Civil Appeals Nos. 20 and 21 of 1960 (unreported) Edmonds, J., stated as follows and I make no apology for quoting the relevant portion in extenso. The reasoning set forth is as valid now in the instant appeals as it was then in the appeals before Edmonds, J.:

> "Apart from this limb of the contention for the appellant, it was further contended that in any event the facts that the appellant may at any time at his option abandon the scheme, that the deed plans have not been registered against the title in the Land Registry, that the plots have no visible boundaries, establish that and that there are no visible means of knowing the boundaries, the plots cannot be held to be rateable units or separate rateable hereditaments. There is no definition of what is or is not a separate hereditament. But in *Gilbert v. S. Hickinbottom & Sons Ltd*., [1956] 2 Q.B. 40, certain tests were suggested by the Court of Appeal by which one may be guided in deciding when properties are a separate or a single hereditament for rating purposes. I think the opinions of the learned Lord Justices in that case are of the greatest application and assistance in the present appeals. At page 48 Denning, L.J., said:
>
> > 'The case therefore raises the important question, what is a separate hereditament for rating purposes? The statutes contain no definition, but the practice which has prevailed for many years past warrants the following general rules:
> >
> > First, take the case where two or more properties are within the same curtilage or contiguous to one another, and are in the same occupation. In that case they are, as a general rule, to be treated for rating purposes as if they formed parts of a single hereditament. There are, however, exceptional cases where for some special reason they may be treated as two or more hereditaments. That may happen, for instance, when they are situate in different rating areas, or because they were valued at different times (see section 3 (3) of the 1928 Act): or because they were at one time in different occupations (see *Spillers Ltd. v. Cardiff Assessment Committee* (1931), 2 K.B. 21, per Avory, J.); or because one part is used for an entirely different purpose (see *North Eastern Railway Co. v. Guardians of York Union*, [1900] 1 Q.B. 733).
> >
> > Secondly, take the case where the two properties are in the same occupation but are not within the same curtilage nor contiguous to one another. In that case each of the properties must, as a general rule, be treated as a separate hereditament for rating purposes; and this is the case even though they are used by the occupier for the purposes of his one whole business . . .
> >
> > Thirdly, take the case where two properties are separated by a public highway, the surface of which is vested in the highway authority and the soil is vested in the occupier of the two properties. In that case the position in general seems to me to be the same as if the two properties were separated by a canal, a railway or a dwelling-house occupied by somebody else. They are normally to be treated as two separate hereditaments for rating purposes.' "

It seems to me that the first test mentioned by Denning, L.J., is the one applicable to the appellant. The plots are contiguous with one another, although private roads have been provided for and constructed for the sub-divisional scheme and have been built solely for the purpose of serving

the plots, no public highway separates them or interferes with their contiguity. All the plots are in the same occupation, that is to say, in that of the appellant. The land does not fall within any of the exceptions mentioned by Denning, L.J., and moreover, the land consists of one property under one title and not of separate properties as discussed by Denning, L.J.

At page 52 of the report, Morris, L.J., said:

> "If, as I think, the decision as to whether premises form one hereditament is a question of fact, then I think that it is undesirable to prescribe some formula in words or to seek to define certain considerations as being relevant and to stipulate that others must be excluded. Parliament has not laid down a definition of a hereditament and difficulties might result if a rigid judicial definition were formulated. In the great majority of cases there will be no difficulty, after assessing all the considerations which apply according to the weight they command, in deciding whether premises comprise a hereditament. In the borderline cases where difficulty arises it is better to employ a common-sense assessment of the features of the case than to seek to have recourse to some standard formula. Thus, to illustrate, there may be several buildings or structures in the same occupation which can properly be regarded as being one hereditament. It may be that they are within one enclosure. That may be one circumstance which points to the conclusion that they comprise one unit: that circumstance may supply a useful basis or test. So also, buildings which, though not actually enclosed together or actually contiguous, are very near together and are not separated by the presence of other buildings and are being put to one common use may be regarded as comprising one hereditament. There can be no doubt that ordinarily very great weight will be placed upon what may be termed the geographical test. But the question is always one of fact and degree. On the other hand, where there are several buildings within one enclosure or curtilage, they may constitute separate hereditaments. This may be so because the buildings are separately let. It may also be so if the buildings, though not separately let, are capable of being separately let and are used for separate purposes. (See *North Eastern Railway Co. v. York Union*.) To illustrate further, if there is a single building which is physically undivided and is in fact in the occupation of one occupier, it may be held to be one hereditament to be rated as a whole even though some parts are capable of separate letting. On the other hand, a single building may have several separate occupiers whose premises may be separately rateable as being separate hereditaments."

And at page 53 Parker, L.J., said:

> "Whether or not premises in one occupation fall to be entered in the valuation list as one or more hereditaments depends upon a number of considerations. Without attempting an exhaustive list, the following considerations can be mentioned:
>
> (1) Whether the premises are in more than one rating area. If so, they must be divided into at least the same number of hereditaments as the rating areas in which the premises are situated.
>
> (2) Whether two or more parts of the premises are capable of being separately let. If not, then the premises must be entered as a single hereditament.

(3) Whether the premises form a single geographical unit.

(4) Whether though forming a single geographical unit the premises by their structure and layout consist of two or more separate parts.

(5) Whether the occupier finds it necessary or convenient to use the premises as a whole for one purpose, or whether he uses different parts of the premises for different purposes.

Whereas a consideration of questions (1) and (2) will in certain events conclude the matter one way or the other, the same does not, I think, result from a consideration of any one of the other questions alone. The conclusion, where the considerations of (1) and (2) are not decisive, must depend on the weight to be attached on the facts of each case to the other considerations.

No doubt the most important of these other considerations is whether the premises form a geographical unit. Can they be ringed round on a map?"

In this case all the unalienated plots can be ringed round on the map. There is a slight break in the ring where a plot, numbered 577, has been alienated, but to all intents and purposes the land which is the subject of these appeals can be said to be ringed round on the map. This geographical test was also referred to by Lord Keith in *Glasgow University v. Assessor for Glasgow*, [1952] S.C. 504 where at page 509 he said:

> 'In the ordinary case where derating issues are not involved the question whether separate buildings or parts of buildings should be entered in the roll as unum quid falls to be decided primarily from the geographical standpoint.'

As is indicated by the Court of Appeal in *Gilbert v. Hickinbottom* (*supra*) and by Channel, J., in *North Eastern Railway Co. v. Guardians of York Union* (*supra*), the question of what is a separate hereditament or a separate unit for rating purposes is one of fact. I think the passage from the judgment of Channel, J., is worth quoting. At page 739 he said:

> 'I agree that it is almost entirely a question of fact. If the whole of these different portions of property were one hereditament, they ought to be rated in one lump sum, and whether they are one hereditament or more seems to me to be a question of fact. One thing I think is clear, that property must be rated according to what it is, and not according to what it might be. You may have a thing which, as it is, is one hereditament, but which is quite capable of being made into two. The owner of a field may sell half of it, and it may become two hereditaments to different occupiers but while it is undivided it is one hereditament. The fact that the different portions of the property here are capable of being made separate hereditaments is immaterial. The facts stated by the arbitrator show that at present they are one, though possibly with some slight alteration they might be made into separate hereditaments.'

For the respondent, the statement that property must be rated according to what it is and not according to what it might be was stoutly emphasised. I understood the contention to be that the fact that it is open to the appellant to vary the sub-divisional scheme or to abandon it represents what might be, and that what must be looked at is the situation as it was at the date of valuation, namely, the division of the land into plots. But this is where I think the contention is wrong. In my view the sub-divisional scheme has

> reached only the stage which makes it possible or practicable for the land to be divided. As far as the title to the land is concerned, the land has not been divided, and, as Channel, J., says, while it is undivided, it is one hereditament. At law the land is not divided and does not become divided until further legal steps of registration are taken. Thus it is that the land must be rated according to what it is – that is to say, one unit or hereditament – and all the facts in my view go to support the conclusion that the land is one unit for rating purposes, and should be so valued. But in valuing the land as one unit or entity, the land must be valued at its best use. Accordingly, the value must be related to the enhanced value of the land consequent upon the sub-divisional scheme, but subject to the consideration that it will take a number of years to take full benefit from the scheme and to the need, therefore, to make the necessary allowance by way of deferment."

With respect I agree with the conclusions of Edmonds, J. In my opinion the pieces of land in question, viewed in the light of the considerations mentioned in the above quoted extract from the judgment of Edmonds, J., can and should be regarded as two single entities only for the purposes of rating.

I accordingly allow the appeal with costs.

Appeal allowed.

For the appellant:
JA Mackie-Robertson, QC and *HN Armstrong*
Hamilton, Harrison & Mathews, Nairobi

For the respondent:
IT Inamdar
Bryson, Inamdar & Bowyer, Mombasa

Kakungulu v Sekiumba Estates Ltd
[1969] 1 EA 557 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	7 May 1969
Case Number:	419/1969 (87/69)
Before:	Sheridan Ag CJ
Sourced by:	LawAfrica

[1] Company – "African" – Whether a company some of whose members are Africans is exempt from provisions of the Land Transfer Act (*Cap.* 202) (*U.*).

[2] Land – Company – Whether a company some of whose members are Africans is exempt from provisions of Land Transfer Act (*Cap.* 202) (*U.*).

[3] Landlord and tenant – Mailo land – Minister's consent not obtained to lease – Occupation of the land illegal – Land Transfer Act (*Cap.* 202) (*U.*).

Editor's Summary

The plaintiff agreed to lease his mailo land to a company half the shareholders of which were not citizens of Uganda, and the company went into occupation of the land. Several agreements were thereafter prepared, to none of which were the necessary consents given. The plaintiff sued for possession of the land.

Held –

(i) the Land Transfer Act applies to companies;

(ii) only companies all of whose members are Africans are exempted from the provisions of the Land Transfer Act;

(iii) as the consent of the Minister had not been obtained the occupation of the land by the company was illegal;

(iv) the agreement had been lawfully terminated.

Judgment for the plaintiff.

Cases referred to in judgment:

(1) *R. E. V. Denning v. D. G. Edwardes and another*, [1960] E.A. 755.

(2) *M. A. Singh v. S. W. Kulubya*, [1963] E.A. 408.

Judgment

Sheridan Ag CJ: The plaintiff, an African landlord, is the registered proprietor of 654.30 acres of mailo land at Sekiunga, Busiro County, which is at mile 12 on the Kampala-Entebbe road. He had mortgaged the land to Baumann & Co. and they were threatening to foreclose by putting it up for sale by auction. In January 1966 he approached his friend Chimenbhai Patel, who was the manager of Madhvani Tea Estates at Nakilagama, which is at mile 8 on the same road. Chimenbhai gave him a cheque for Shs. 13,305/-to release the land. In consideration of this the plaintiff made a verbal agreement with Chimenbhai to lease the land to him at a rent of Shs. 600/- per annum. Chimenbhai referred the matter to Mr. S. G. Patel, advocate. As a result of this on March 29, 1966, Sekiumba Estates Limited-the defendant-was incorporated as a private limited company with a paid up capital of Shs. 30,000/-. The members and directors were Chimenbhai, Ambilal Jethabhai, Mepa Deva Chundavadra and the plaintiff. There were 100 shares of Shs. 300/- each. Ambilal held 35 shares, Chimenbhai and Mepa 30 shares each and the plaintiff was issued with 5 free shares. Chimenbhai and Mepa are British subjects. Ambilal and the plaintiff are Uganda citizens.

In fact the defendant went into occupation of 400 acres of the plaintiff's land in early January 1966 before any agreement was drawn up. I accept that it consisted largely of swamp, bush and forest and had to be cleared at considerable expense for the cultivation of sugar cane and the erection of a jaggery factory. Mepa stated that due to these development expenses there was no profit and that up to August 1968 the loss was about Shs. 9,000/-.

On May 14, 1966, Mr. S. G. Patel prepared an agreement to lease between the plaintiff and the defendant whereby he agreed to lease 400 acres out of the plaintiff's 654.30 acres for 49 years at an annual rental of Shs. 600/-. The agreement recited that the lessee had paid the lessor Shs. 15,000/- as rent in advance "as and when a proper lease is executed". Clauses 10 and 11 of the agreement provide:

> "10. On receipt of the Lukiko's consent and the consent of the President and the Minister of Central Government of Uganda the Lessor shall forthwith execute a proper lease and sign all necessary papers and documents for registration thereof.
>
> 11. In event the said consents are refused and/or not received within reasonable time the Lessor shall return to the Lessee Shs. 15,000/- paid on account as aforesaid forthwith and this agreement shall be treated as cancelled."

Under s. 2 (*c*) of The Possession of Land Law 1908 (Vol. 16 of the Laws of Uganda 1964, p. 5155) an owner of mailo was not permitted to hand over his mailo to one who was not of the Protectorate, except

with the approval of the Governor and the Lukiko. Sections 2, 3 and 4 (1) of the Land Transfer

Act (Cap. 202), omitting proviso (*a*) to s. 2 which is not relevant to this suit, read as follows:

> "2. No non-African or any person acting as his agent shall without the consent in writing of the Minister occupy or enter into possession of any land of which an African is registered as proprietor (otherwise than by receiving rents and profits payable by non-Africans who have gone into occupation or possession with the consent of the Minister) or make any contract to purchase or to take on lease or accept a gift inter vivos or a bequest of any such land or of any interest therein other than a security for money:
>
> Provided that –
>
> (*a*) – – – – –
>
> (*b*) for the purposes of this section only, a company duly registered under the Companies Act all the members of which are Africans and which contains in its articles of association a clause preventing the transfer of any of its shares to a non-African shall be deemed to be an African. No member of such company shall hold shares in trust for a non-African.
>
> 3. The Minister may refuse the consent mentioned in section 2 of this Act without assigning any reason, or may specify terms upon which such consent is conditional.
>
> 4.(1) Any person who contravenes the provisions of this Act or of any terms imposed by the Minister under section 3 of this Act shall be guilty of an offence and liable on conviction to a fine not exceeding twelve months or to both such fine and imprisonment.
>
> (2) – – – – – "

It is not in dispute that no consents were applied for in respect of this agreement to lease and the reasons given are:

(1) that the land had not been surveyed. An unmarked plan which was apparently annexed to the plaint shows that it was surveyed on September 23, 1966;

(2) owing to the breakdown of the Buganda Government following on the disturbances on May 22, 1966, it was impossible to say what consents were necessary and how they were to be obtained.

On May 2, 1967, the parties made a fresh agreement to lease which seems to be identical with the previous one save that there is no reference to the 654.30 acres; only to 400 acres. This was after the separate title deed was ready. The application form for the Lukiko consent was filled in and signed by the plaintiff. It was submitted along with the fresh agreement to the Lukiko Land Office. On May 23, 1967, Mr. K. L. Anderson, an Assistant Commissioner of Lands and Surveys Department, wrote to Mr. S. G. Patel stating that the papers had been passed to him to hold until the consent of the Lukiko Ministers could be granted under the Buganda Land Law. He went on to state that he was unable to recommend that the Minister of Mineral and Water Resources should give his consent under the Land Transfer Act to the lease as it stood because *inter alia* (1) the rent stated of Shs. 1/50 per acre was grossly inadequate and (2) arrangements for the compensation of any tenants of the land should be incorporated in it. Mr. Anderson gave evidence that it was the practice to forward an agreement to lease or a draft lease along with the consent form. Otherwise how could the Land Office know if the terms were fair?

In consequence of this letter on June 27, 1967, yet another agreement to lease

was signed increasing the rent to Shs. 2,000/- per annum and providing for compensation for the tenants. Mepa gave evidence, which was not contradicted, that the defendant paid the plaintiff Shs. 7,900/- to compensate 20 tenants.

All the agreements contain a recital:

> "AND WHEREAS pursuant to such agreement the Lessee has paid to the Lessor a sum of Shs. 15,000/- (Shillings Fifteen thousand) being part payment towards rent for the aforesaid lease (the receipt whereof the Lessor hereby acknowledges) which said sum is to be appropriated towards the rent of the said 400.0 acres of land as and when a proper lease is executed."

It appears from a receipt bearing the same date given by the plaintiff to the defendant that this sum represented 7½ years' rent in advance and was made up by the Shs. 13,305/- cheque paid by Chimenbhai to Baumann & Co. and other cash advances to the plaintiff between May 1966 and May 1967. The latest agreement along with the consent form were forwarded to the Commissioner of Lands and Surveys under a covering letter from Mr. S. G. Patel. Thereafter Mr. Patel received the following undated cyclostyled circular:

"Land & Surveys Department,

P.O. Box 361,

18. Kampala, Uganda

196

Application for consent to lease
Mailo land

I have received your application for consent to lease mailo land the details of which are given below.

I regret that until such time as provision has been made for the granting of the Lukiko Minister's consent required by the Buganda Possession of Land Law 1908 no further action can be taken on the application and I am retaining it for future action.

	Mailo Register	Block/Volume	Plot/Fol.
Lessor			
Lessee			
Area			

(sgd) K. L. Anderson

for Commissioner of Lands & Surveys"

By Statutory Instrument 1967 No. 150 made on December 14, 1967, under s. 100 (6) of the Local Administration Act 1967 the power vested in the President and the Lukiko to give approval under paras, (*c*) and (*d*) of the Possession of Land Law was transferred to the Minister responsible for Mineral and Water Resources.

In January 1968 Mr. Patel collected the agreement and the consent form and a new "Application For Consent, To Lease Mailo Land to Non-Africans".

In setting out the terms of the lease there are four columns for (1) duration, (2) premium, (3) annual rent and (4) rent revision. In the previous forms there had been no mention of a premium. It is the plaintiff's case that when he

signed the latest agreement he asked for a premium of Shs. 150,000/- – and Mr. Patel told him that that would have to be arranged with the defendant company – but Mepa, a director of the company, was present when he signed. Mr. Patel stated that on February 6, 1968, the plaintiff took away the latest application for consent and said he would think about the matter. When Chimenbhai asked the plaintiff to sign it he said "Government has written 'Premium' so I want Shs. 45,000/- premium and Shs. 4,000/- rent". It is to be noted that the agreements are silent on the payment of a premium as in the agreed correspondence. It is not pleaded. I accept the evidence of Mr. Patel, an impartial witness, that there was no mention of a premium. It is the sight of the word "Premium" that gave the plaintiff the idea of pressing for one. If he had truthfully filled in the form he would have had to enter "nil" in that column.

Other issues were:

(1) is the agreement to lease without consent void ab initio;

(2) is the defendant company a non-African limited liability company within the meaning of Cap. 202;

(3) are any consents necessary;

(4) has there been a breach of clause 13 of the agreement;

(5) has it been lawfully determined:

(6) is the defendant company in occupation of the land;

(7) did the defendant company enter into occupation before any agreement was made.

The answers to the sixth and seventh issues are "yes".

On the second issue Mr. Pandit for the defendant submitted that as Mr. Francis Mukangara, an executive officer in the Companies Registry, described the defendant company as being owned by an African and Asians, it is a mixed company and is therefore not a non-African. I am unable to follow this. Proviso (*b*) to s. 2 of Cap. 202 only exempts from the provisions of the Act a company all the members of which are Africans. That is not the case here. The answer to the second issue is "yes".

Mr. Pandit further made the bold submission that s. 2 only applied to a non-African individual and he laid emphasis on the words "or any person acting as *his* agent". Here he overlooked the definition of "person" in s. 3 of the Interpretation Act (Cap. 16) to include any company or association or body of persons, corporate or non corporate. Also s. 4(1) deals with grammatical variations and (3) provides that words and expressions in the singular include the plural. It follows that the consent of the Minister has not been obtained and the occupation of the land without it is illegal. Whether it was void ab initio I am not quite clear. In *R. E. V. Denning v. D. G. Edwardes and Another*, [1960] E.A. 755, it was held that under the Crown Lands Ordinance in Kenya there was nothing contrary to law in entering into a written contract before the Governor's consent was obtained and the legal consequence that ensued was that the agreement was inchoate till that consent was obtained; once consent was obtained the agreement was complete and completely effective. This does not seem to be easy to reconcile with *M. A. Singh v. S. W. Kulubya*, [1963] E.A. 408, where the facts were similar to the present case. At p. 410 Lord Morris of Borth-y-Gest in delivering the opinion of the Judicial Committee of the Privy Council said:

> "The defendant was also acting in contravention of the law; he was committing an offence when he occupied and entered into possession of the land and when he made a contract to take the land on lease."

On the fourth issue there has been a breach of clause 13 of the agreement. I think it was lawfully terminated by the notice dated May 28, 1968. The plaintiff must of course return the Shs. 15,000/-. Even if the notice were insufficient *Kulubya's* case (*supra*) makes it clear that the African landlord's right to possession exists apart from any illegal or ineffective agreements.

There will be judgment for the plaintiff with an order for vacant possession of the land and costs.

Order accordingly.

For the plaintiff:
GL Binaisa, QC
Binaisa & Co, Kampala

For the defendant:
SV Pandit
SV Pandit, Kampala

Kirenga v Uganda
[1969] 1 EA 562 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	27 May 1969
Case Number:	117 – 118/1969 (89/69)
Before:	Jones J
Sourced by:	LawAfrica

[1] Evidence – Admissibility – Tape recording – Of incriminating conversation relevant to the charge against accused.

Editor's Summary

Two police officers were charged with inciting perjury and attempting to interfere with a witness. The Chief Magistrate convicted each accused of both offences and sentenced them to nine months and three months in respect of each conviction, the sentences to run concurrently. On appeal to the High Court of Uganda, the main ground was that tape-recorded evidence admitted to corroborate was inadmissible. The first accused had been charged earlier with criminal assault, and a day prior to the trial both accused invited a prosecution eye-witness to the assault to meet them by appointment. The police fixed a cassette type of recorder to the eye-witness hung in his trousers and sent him to keep his appointment. The witness got into a car occupied by the two accused and a third policeman. He switched the tape recorder on and recorded a conversation incriminating the first accused, who clearly tried to persuade the witness

to perjure himself relating to the assault charge. It was contended that the tape recording was not "evidence" as defined by s. 3 of the Evidence Act.

Held – The tape recording was admissible in evidence as a proper foundation for its reception had been made.

Appeal dismissed.

Cases referred to in judgment:

(1) *Reg. v. Raojibhai Girdharbhai Patel & Another* (1956), 23 E.A.C.A. 536.

(2) *R. v. Ali Hussain* (1965), Crim. Law Rev. 373.

(3) *R. v. Burr & Sullivan* (unreported).

(4) *R. v. Mills & Rose* (1962), 46 Cr. App. Rep. 336.

(5) *R. v. Bryant and Bryant* (unreported).

(6) *R. v. Howells* (unreported).

(7) *Hopes and Another v. H.M. Advocate*, [1960] S.L.T. 264.

Judgment

Jones J: The appellant and one Kasoro were convicted by the Chief Magistrate, Mbale, of

(1) Being Public Servants inciting perjury contrary to section 23 (2) of the Penal Code; and

(2) attempting to interfere with a witness contrary to section 101 (*f*) of the Penal Code

on February 8, 1969.

They were sentenced to nine months on the first count and three months on the second count, the sentences to run concurrently.

The appellant appealed both against conviction and sentence.

The facts were succinctly stated in the judgment:

> "The two accused are employed in the police force and are stationed at Mbale; Kirenga (A.1) is an Inspector and Kasora (A.2) an Assistant Superintendent.
>
> At the material time, that is, February 1968, A.2 was in charge of a squad in the North Division of Mbale CID. Included in this Division is the North sub-division which was in the charge of Assistant Inspector Okia (P.W.1) and working under him was Det/Stn. Sgt. Paskali Lasito (P.W.2).
>
> There was undisputed evidence that in February, 1968, a criminal prosecution for an assault was pending against A.1 in Mbale Criminal Case No. MM 1956/67 which was scheduled for hearing on 9th February, 1968.
>
> The prosecution case is that one day prior to the hearing of that case both A.1 and A.2 got Lasito (P.W.2) who was an eye-witness against A.1 in that case to see them by appointment and both incited him to commit perjury and interfered with a prospective witness in criminal proceedings.
>
> On 8th February, 1968, Lasito (P.W.2) was given a message by his superior officer (P.W.1) Okia to go and see A.2 in his office. This interview was also attended by A.1 and Lasito was instructed by A.2 to see him later that evening between 5.30 and 6 p.m. near Maluku Bar. This arose suspicion in Lasito's mind and he reported to P.W.1 who in turn contacted the Superintendent of CID, Mr. Singh (P.W.4). Lasito (P.W.2) repeated the interview to (P.W.4) Mr. Singh and also mentioned his suspicion. After obtaining approval from the Senior Superintendent-in-charge, CID, Mr. Mukasa (P.W.6), Singh then proceeded to tie a cassette type tape-recorder similar to the one produced in Court 'A' to Lasito's body. This tape-recorder and its microphone 'C' were tested both by Singh and Suresh Gondhia (P.W.3), a radio shopkeeper and a new cassette tape was inserted in the machine after it, too, had been tested. The tape recorder was tied to Lasito's waist with the help of two belts (Exhibit P.1) and the microphone was hung on the inside front of his trousers. The full workings of the tape-recorder were also explained to Lasito.
>
> S.P. Singh then instructed him to keep the appointment with A.2 as arranged and also detailed Det/Constable Watulo (P.W.7), who had arrived in Mbale on transfer from Lira only the previous day and as such was still unknown to officers, to trail Lasito when he went for the appointment.

> Lasito duly kept this appointment and, near the arranged place of meeting, saw A.1's car which turned round to meet him. He saw A.1 driving it and sitting next to him in the front seat was Det/Sgt. Dramani (he was not called) and in the rear seat was A.2. Watulo (P.W.7), who had been shadowing Lasito keeping a distance of about five yards, saw Lasito getting into this car and he himself returned to the Police Station. Lasito switched the tape-recorder on just before entering the car and sat with A.2 in the rear seat. A.1 then drove away towards Bugema and started talking after a little while. Lasito remembered A.1's opening sentence which was:
>
> > 'You know, my case of Nylon Bar is coming tomorrow. I want you to co-operate with me because that Singa Singa wants to put me in trouble. I rely only on you two NCOs. But the constables, I will crush them.'
>
> He went on to say that he had professed ignorance when A.1 had asked him if he knew how the man had got injured. He explained that he told a deliberate lie as he did not want to disclose his 'matters'.
>
> He said that A.1 asked him to deny in Court any knowledge of how the man had got injured and to say that 'that man was drunk and was falling by himself'."

The tape recorder evidence played an important part in the proceedings. The tape was played back in Court and Mr. Saidi accepted the tape in evidence and said that he found that the tape contained the original conversation and had not been interfered with. In doing that he accepted the evidence of one Mr. Gondhia who had supplied the tape for the occasion and had removed two square pieces of plastic from either side of the bottom of the cassette. He explained:

> "This is a method whereby whatever has been reported on the cassette tape cannot be erased and even if an attempt is made to record something it will not be recorded. In other words, the original recording will stay intact."

Mr. Haque for the appellant attacked the judgment on the following grounds:

> "1. That the alleged tape recording of the alleged conversation between the appellant and Lasito was in law wrongly admitted in evidence and this has resulted in a miscarriage of justice.
>
> 2. That on the evidence in any event there was, in law, no 'incitement' as is envisaged by section 23 (2) of the Penal Code.
>
> 3. That there was no evidence that the acts of the appellant amounted to interference within the meaning of section 101 (*f*) of the Penal Code.
>
> 4. That the sentences imposed are harsh and excessive and not justified in the circumstances of the case."

In his argument before this Court, Mr. Haque concentrated almost entirely on the admissibility of the tape-recorded evidence.

Mr. Haque argued that evidence had to be (1) oral, or (2) documentary, or (3) ocular evidence.

He said that a tape recording was none of these things. He relied on the definition of "evidence" in s. 3 of the Evidence Act which I now proceed to quote:

> " 'evidence' denotes the means by which any alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved and

> includes statements by accused persons, admissions, judicial notices, presumptions of law, and ocular observation by the court in its judicial capacity."

I cannot agree with Mr. Haque that the definition of "evidence" is *limited* to the three types of evidence outlined by him in his argument before me.

It *includes* (but is not the only means) (*a*) statements by the accused persons, (*b*) admission, (*c*) judicial notice, (*d*) presumptions of law, (*e*) ocular observation.

What the accused told the Sergeant was very much a matter of fact which was submitted to investigation by the court. Evidence given by the Sergeant of the conversation between him and the accused was not only admissible in court, but was essential for the successful prosecution of the case. That would sometimes be imperfect by reason of a faulty memory or imperfect hearing. It was not denied, or argued, that a tape recording of a conversation when properly conducted is perfect. It would contain everything which the accused, or the witness, said and not merely the recollection of what the witness or accused had said. Properly conducted, and laid, the tape-recorded conversation could, and would therefore be infinitely superior to that of oral evidence by a witness of what he heard or thought he heard the witness or accused say.

The question of tape recordings, as evidence, was dealt with in *Reg. v. Raojibhai Girdharbhai Patel and Another* (1956), 23 E.A.C.A. 536. It was taken before the Court of Appeal on a case stated as the magistrate who dealt with the case in the lower court had decided that a tape recording was inadmissible.

The Court of Appeal held that "where a proper foundation had been laid, such evidence (recorder, recording and transcriptions) is admissible and a recording may be played back in Court".

In 1965 the Court of Criminal Appeal in England (Marshall, Lawton, Roskill, JJ.) held in *R. v. Ali Hussain* (reported in Criminal Law Review 1965 at page 373) that:

> "(1) There is no difference in principle between a tape recording and a photograph. A tape recording is admissible in evidence provided the accuracy of the recording can be proved, the voices properly identified and the evidence is relevant and otherwise admissible. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances. But there could be no question of laying down any exhaustive set of rules regarding the admissibility of such evidence: *R. v. Burr & Sullivan* (unreported, but see (1956) Crim. L.R. 442); *R. v. Mills & Rose*, 46 Cr. App. R. 336; *R. v. Bryant and Bryant* (unreported), July 27, 1964, Newport Assizes; *R. v. Howells* (unreported), January 14, 1965, Nottingham Assizes; *Hopes and Another v. H.M. Advocate*, 1960 S.L.T. 264. (2) The manner in which the recording was obtained was not unfair. A. and H. had not been in custody and the Judges' Rules therefore did not apply. The recorder was no more than a mechanical eavesdropper. The method of taking the recording cannot affect admissibility as a matter of law although it must remain a matter for the discretion of the judge. (3) The recording was properly admitted since the difficulties involved were overcome to a reliable degree – in particular the defence translations agreed with the prosecution's as to the material parts, and the judge had given the jury an extensive warning as to the dangers involved. (4) Having a transcript of a recording is a most obvious convenience and a great aid to the jury. Provided a jury is guided by what they hear for themselves in court and they base their ultimate decision upon that there is no objection to a copy of a properly proved transcript being put before them. In the present case all the translations were submitted to detailed cross-examination. (5) In the

> present case the judge was persuaded to undertake an inquiry into the weight of the evidence before it was called before the jury. The cases must be rare where the judge is justified in undertaking his own investigations into a matter which is the province of the jury. The present case was such a one since the issues of admissibility and weight overlaid each other."

A commentary on that case is also illuminatory:

> "On the question of admissibility of tape recordings see (1958) Crim. L.R. 8 and (1961) Crim. L.R. 598. The admissibility of the recordings in the circumstances detailed by the court seems highly desirable. The evidence is clearly logically relevant and does not apparently fall foul of any of the rules of exclusion. It is not, for example, hearsay – any more than a photograph of some event is hearsay. The use of a transcript to assist in following the recording also seems unobjectionable provided that oral evidence is given by the person who made the transcript. The present case apparently purports to go no further than this, because of the proviso that the jury must be guided by what they themselves hear. What is difficult to follow, however, is how the jury could be guided by what they heard, if the recording was in a Punjabi dialect which, presumably, none of them understood. 'What they heard' must presumably refer to the oral evidence of the translators as to the meaning of the recording. This would be direct evidence-as would that of an expert witness as to the interpretation of a photograph – but the transcript itself would seem to be hearsay: of. Attard, (1959) 43 Cr. App. R. 90.
>
> It is well established that the fact that evidence is obtained by underhand means, such as eavesdropping or even by illegal means, is no bar to its admissibility in English law."

[See an article on "Mechanical Aids to Evidence" which appeared in the Criminal Law Review 1958 at p. 8.]

As this is the first case of its kind to be brought on appeal in Uganda it would perhaps be apposite if a fairly copious quotation from the article on "sound recordings" is inserted here which I proceed to do:

> "Aural aids to evidence, such as the tape recorder, are not so well known to our courts, but their novelty should not prevent their admission on principles almost exactly the same as those governing photographs.
>
> Thus, there must be some human witness who produces the recording and vouches for its accuracy. And whether or not the evidence given by the recording is inadmissible as hearsay will depend upon whether the same evidence in the mouth of the witness would be hearsay. If the recording is merely of what X (someone other than the sponsoring witness) said about the facts in issue, such is obviously inadmissible as hearsay; but if what X said is one of the facts in issue (e.g. if X is accused of uttering seditious words, or of conspiring with another person and the conspiracy is alleged to be in a conversation with that other person) then, just as the sponsoring witness is enabled to prove what X said by saying what he heard X say, so he is able to prove it by producing and playing over a recording of the conversation. The same position obtains where the witness is allowed to say what X said, not because X's words are a fact in issue, but because evidence of X's words is admissible as an exception to the hearsay rule, as where they amount to an admission or confession by X.
>
> In the same way as the accuracy, position, etc., of a camera must be vouched for by someone having personal knowledge, so must the position,

> strength and accuracy of the recording apparatus, and the identity of the owner of the recorded voice be established by evidence. The identity of the owner of the voice will, in cases where the voice has no strong peculiarities which permit of the court making a comparison with the voice of some person speaking in its presence, have to be proved by circumstantial evidence. This could be done by proving that X was seen to utter the recorded words standing within the proved range of a microphone proved to be in a certain position, and proving that the microphone was in fact connected with the recording apparatus now produced. This would require the court to take judicial notice (or else to hear expert witness) of the fact that sounds made within the range of the microphone are transmitted through, and accurately reproduced by, the apparatus, and to draw the inference that the voice heard in the courtroom is that of X."

We are now living in the electronic and space age. Learned jurists all over the world are considering even the question of computer evidence, but that, happily, is not something which I have to deal with in this case.

I see no reason why tape recording evidence which has been accepted everywhere else should be excluded here if properly laid. I consider it comes within the definition of evidence as defined in the Evidence Act.

I am perfectly satisfied that the learned Chief Magistrate, in a careful judgment, properly admitted the tape recording of the conversation between the accused and the sergeant. Having done so the conviction was well founded.

Mr. Haque did not pursue his point on "incitement". There can be no doubt, however, that the whole matter of incitement was exhaustively dealt with in the judgment and the learned Chief Magistrate came to the proper conclusion.

I dismiss the appeal against conviction.

[The learned judge then proceeded to deal with the appeal against sentence and concluded:] I do not propose therefore to interfere with the sentences. The appellant's appeal against sentence is dismissed.

Order accordingly.

For the appellant:
Z Haque
Haque & Gopal, Kampala

For the respondent:
AM Khan
Director of Public Prosecutions, Uganda

Mankuleiyo v Otis Elevator Company Ltd
[1969] 1 EA 568 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 21 April 1969

Case Number: 823/1968 (90/69)

Before: Dalton J

Sourced by: LawAfrica

[1] Contract – Implied terms – Contract of employment where no terms expressed as to length of service or payment during sickness.

[2] Master and Servant – Contract of Service – Sickness – Terms of contract – No express terms as to length of service or payment during sickness – What terms to be implied.

[3] Master and Servant – Injury to servant – Negligence of master causing injury – Master's duty to provide safe system of work – Discharge of that duty where servant competent.

[4] Negligence – Injury to servant – Master does not have constantly to supervise a competent servant.

Editor's Summary

The plaintiff's contract of employment with the defendants did not contain express terms relating to the length of the contract or to payment during absence from work due to illness. Shortly after starting work the plaintiff suffered an injury which kept him away from work for about a month, during which time he did not receive full pay. Subsequently, whilst cleaning the guide rails of a lift, the plaintiff suffered an injury to his knee which he alleged was caused by the negligence of the defendants. After nine months' employment the defendants terminated his contract by paying four weeks' salary in lieu of notice. The plaintiff brought this action claiming: (i) damages for wrongful termination of employment; (ii) arrears of salary wrongfully deducted during illness; and (iii) damages for injury to his knee.

Held –

(i) on the facts of the case the contract of employment was an indefinite hiring terminable by reasonable notice at any time;

(ii) whether a servant is entitled to be paid during short periods of absence depends entirely on the terms of the contract (*O'Grady v. M. Saper Ltd*. (1) applied);

(iii) when it is known that in practice wages during illness are not paid by the master to servants employed in a capacity similar to the plaintiff, it is an implied term of the contract that wages are not payable during the plaintiff's illness;

(iv) the defendants were entitled to assume that the plaintiff, whom they had employed for some months, was competent to clean the guide rails of a lift without constant supervision.

Judgment for the defendants with costs.

Cases referred to in judgment:

(1) *O'Grady v. M. Saper Ltd*., [1940] 2 K.B. 469.

(2) *Storey v. Fulham Steel Works Co*. (1907), 24 T.L.R. 89.

Judgment

Dalton J: The plaintiff claims from the defendant sums of money under four heads as follows:

(*a*) damages amounting to Shs. 30,414/- for the wrongful termination of his contract of employment.

(*b*) Shs. 4,036/- which sum was wrongfully deducted from his salary, whilst the plaintiff, during the course of his employment, was unwell and under medical treatment.

(*c*) special damages amounting to Shs. 360/- for injury to his knee sustained whilst working.

(*d*) general damages for such injury.

The plaintiff was employed by and entered the service of the defendant on August 15, 1966, as a mechanic. On August 20, 1966, the plaintiff signed a document which was in the following terms:

"OTIS ELEVATOR COMPANY LTD., NAIROBI
EAST AFRICA

Conditions of Employment – Mechanics

1. Hours of work. The ordinary hours of work are 40 in any one week.
2. Rate of pay Shs. 10/- per ordinary hour.
3. Overtime. Hours worked will be paid for at 1½ times the hourly rate in clause 2.
4. Standby. An Employee required to 'Standby' will receive an allowance of Shs. 70/- plus overtime in terms of clause 3.
5. East Africa allowance 3/- per ordinary hour.
7. Paid leave and passage allowance. The Company offers a choice of:

 A. Two weeks' leave after one year's service and four weeks' leave at the end of the second year. A passage allowance will be paid at the end of the second year as follows:

 Single Mechanics Shs. 2,060/ –

 Married Mechanics Shs. 4,120/ –

 B. Two weeks' leave at the end of the first and second year's service and six weeks' leave at the end of the third year. A passage allowance will be paid at the end of the third year as follows:

 Single Mechanics Shs. 3,960/ –

 Married Mechanics Shs. 7,920/ –

8. Holiday leave bonus. A bonus of Shs. 1,000/- will be paid at the end of each year of service.

I understand and accept the above conditions and choose contract B.

Signed – plaintiff.

Commencing date of contract 15th August, 1966."

It is then pleaded:

"6. The plaintiff continued his services as aforesaid with the defendant as such mechanic or technician but in breach of the said agreement of service the defendant wrongfully repudiated the said agreement and/or wrongfully determined the plaintiff's said employment summarily on the 15th May, 1967, without assigning any reason.

PARTICULARS

On the 15th May, 1967, one F. Sardano, the managing director of the defendant company, told the plaintiff in spite of his protests that his services

were determined forthwith consequent upon which the plaintiff was told to return later in the day to collect his due and other documents. It was at about 3 p.m. the same day the plaintiff was made to sign a pink card in duplicate by the managing director not as a free agent but under pressure, the nature and contents whereof was not disclosed nor is known to him until this day and was given apart from other documents a certificate of service indicating that the plaintiff's services came to an end on the 8th day of May, 1967 rather than the 15th day of May, 1967 the day on which in fact they were terminated. The plaintiff was also paid the sum of Shs. 4,203/75 after usual deductions which sum included an extra amount added to the tune of Shs. 3,700/- approximately by way of additional salary in lieu of notice, proportionate leave pay, bonus and passage allowance.

7. By reason of the defendant's said repudiation and/or breach of the contract the plaintiff was unable to get employment elsewhere until the 2nd November, 1967 when he was employed as a technician with the Kenya Government at a reduced salary of Shs. 1,416/- per month for the first two months and thereafter Shs. 1,706/- per month and suffered loss and damage and was deprived of the benefits that would have accrued to him under the said contract had he been allowed to continue in the employment for the unexpired residuary period of 27 months.

Particulars of special damage

Loss of salary from 16th May, 1967 to 1st November, 1967 in 5½ months at Shs. 2,080/- average monthly earnings of the plaintiff	Shs. 11,440/–
Difference in salary earned for the months of November, 1967 and December, 1967 at Shs. 664/- for each month, i.e. Shs. 2,080/- minus Shs. 1,416/-	Shs. 1,328/–
Difference in salary earned for the balance of 19½ months at the rate of Shs. 374/- each month, i.e. Shs. 2,080/-minus Shs. 1,706/-	Shs. 7,106/–
Aggregate 10 weeks' leave, i.e. 70 days for three year speriod at Shs. 104/- per day	Shs. 7,280/–
Passage allowance single mechanic	Shs. 3,960/–
Leave bonus for three years period	Shs. 3,000/–
Less paid to the plaintiff on the termination of employment approximately	Shs. 3,700/–
Balance	Shs. 30,414/–

8. During the course of the employment of the plaintiff the defendant from time to time deprived the plaintiff by deducting his salary for an aggregate period of 34 days at Shs. 104/- per day whilst the plaintiff as known to the defendant was unwell and under medical treatment. The defendant also failed within the same period to reimburse the plaintiff to the extent of Shs. 500/- for the medical expenses incurred by the plaintiff in respect of injuries received by him in the course of his employment. The plaintiff therefore claims the sum of Shs. 4,036/- due as aforesaid.

9. On or about Sunday the 11th December, 1966 at about 4 p.m. whilst the plaintiff was on overtime duty on the Administration Block Lift at the I.P.S. Building, Nairobi the defendant's foreman, Mr. Ian McMurdoe ordered the plaintiff to climb the guide rails on which the lift was expected to slide and

insisted that the plaintiff hurried with the job of filing and cleaning the said rails as the fully functioning lift was required to be handed over to the owners of the said building the very next day.

10. The defendants as employers impliedly agreed with the plaintiff or alternatively it was the duty of the defendant as employers to provide a safe system of work, proper appliances to execute relevant orders and effective supervision of the process of cleaning and filing the guide rails. The defendant or their servants or agents committed breaches of the said agreement or were negligent in that they:

(*a*) Rushed the said process of cleaning and filing the rails;

(*b*) failed to watch and supervise the said process;

(*c*) failed to provide a safety belt or other safety appliance or device to carry out the operation of cleaning and filing the guide rails;

(*d*) failed to take any or any proper precaution for the safety of the plaintiff.

11. By reason of the defendants' breaches of the said implied agreement or alternatively the defendants' negligence aforesaid in the course of the said cleaning operation performed by the plaintiff in compliance with the orders of the defendants' servant the plaintiff lost control and slipped and in the process of saving himself from a fall the plaintiff's whole body twisted over his right knee causing internal injury and damage to the plaintiff's right knee.

Particulars of injury

(i) Shock.

(ii) Ossification of the quadriceps tendon at the upper pole of the patella.

Particulars of special damage

Motor vehicle expenses for approximately 12 attendances for physio-therapy treatment of the knee at the Aga Khan Hospital	Shs. 100/ –
November, 1967, two X-rays	Shs. 120/ –
Specialist fee for two visits at Aga Khan Clinic	Shs. 35/ –
Paid for medical report	Shs. 105/ –
	Shs. 360/ –

The plaintiff is therefore claiming against the defendant the sum of Shs. 34,810/- plus general damages for personal injury."

Concerning the averment in paragraph 5 of the plaint that the contract of service was for a fixed period of three years the defendant denied that it was for such a period and pleaded that the contract was of indefinite duration terminable upon reasonable notice. The defendant contended that since the plaintiff was paid weekly a week's notice would be reasonable notice, though in fact the plaintiff was given four weeks' notice. The defendant denies that the plaintiff is entitled to the sum he claims in paragraph 7. It is also denied that he is entitled to the sum claimed under paragraph 8 and it is pleaded that the plaintiff was absent for ten days for which he was paid in full, for fifteen days for which he was paid half pay, and for twenty-four days for which he was not paid; all of which was in accordance with the plaintiff's terms of service. The defendant further denied that it was negligent or in breach of duty as alleged concerning the injury which the plaintiff claimed he suffered; it was also denied that he suffered such injury. Finally it was pleaded that the plaintiff was discharged because he was unfit to do his job by reason of his continual absence from duty.

The plaintiff, as agreed, started work for the defendant company on August 15, 1966. The plaintiff said that on August 13. on his way home from work, he

gave a lift to a drunken shamba boy and it appears that there was some sort of fracas in which the plaintiff's index finger was broken. The plaintiff said that he reported for work next morning with his finger in plaster and that the foreman Mr. George Turfus told him that he should stay at home until it was properly mended. The plaintiff was away from work for four weeks on this occasion. Concerning his claim under paragraph 8 of the plaintiff that he was deprived of part of his pay the plaintiff said that he did not know of a company regulation dealing with absence from work on account of illness which provided during any one year for two weeks on full pay, two weeks on half pay and thereafter no pay. He referred to two pay slips in the bundle of pay slips and said they showed he only received two and a half days' pay for five days. Put another way they show that in the third and fourth weeks of the time he was marked sick he received half pay. He said that he spoke to Mrs. Jones, the accountant in the defendant company, about this matter and that she told him that it was what she was instructed to do. He said she did not say that they were her normal instructions. The plaintiff said that he also protested when later he received no pay at all, but he was then told by George Turfus that if an employee was away sick he did not receive pay. Mr. Sardano said that the plaintiff must have known about the pay regulation concerning sickness because right at the beginning of his employment he went on half pay and he must have asked, if he didn't know. Mrs. Jones who appeared to me to be a truthful and reliable witness said in her evidence:

> "He (the plaintiff) asked me why he had received half pay whilst he was sick and off duty; I don't recall the date but very shortly after he began work with company. I explained that the first two weeks' absenteeism through illness was full pay and the following two weeks half pay – in any one year. I explained that if one is off sick for more than four weeks, I was sorry it meant no pay. I don't quite recall how the plaintiff reacted but he seemed rather surprised; he accepted the position."

I am quite sure that the plaintiff, like any other normal person where pay is concerned, enquired about the matter when he received half pay and I have no doubt that Mrs. Jones told the plaintiff precisely what she said in this court; there was no reason why she should tell the plaintiff anything else. So I am satisfied that at some time within six weeks of taking up his employment the plaintiff knew of the defendant's regulation concerning absence through illness. As set out in the headnote to the case of *O'Grady v. M. Saper Ltd.*, [1940] 2 K.B. 469, the question whether a servant is or is not entitled to be paid his wages during short periods of absence from work through illness, depends entirely on the terms of the contract which will often require to be ascertained by reference to the facts. There are no express terms concerning payment during illness in the letters between the plaintiff and Mr. Sardano, nor in the document entitled "Conditions of employment", and so it is necessary to discover whether there are any implied terms dealing with the matter. In Chitty on Contracts (22nd Edn.), Volume II, para. 1121 it is stated:

> "When it is known to the parties that, in practice, wages during illness are not paid by the particular master to servants employed in a similar capacity to that of the servant in question, it is an implied term of the contract that no wages are payable during the servant's illness."

In this case I am satisfied the parties knew that the defendant did not pay wages when the servant's illness extended beyond four weeks in any one year and I find that such was an implied term of the contract between the plaintiff and the defendant. The plaintiff's claim under paragraph 8 of the plaint for wages for a period of 34 days at Shs. 104/- per day must therefore fail.

I will now deal with a lesser claim, that is in monetary terms, of the plaintiff, i.e. the claim for special and general damages for injury to his knee. On December 11, 1966, when the plaintiff suffered the injury, he and other employees were working hard to get the lift ready for handing over for use on the 13th. One of the jobs that had to be done was to clean the guide rails of the lift with a file to get rid of any rust or cement that might be on them. The plaintiff said that in order to clean the guide rails he had to climb up them. He described how he locked his right leg around the rail and on to the bracket which holds the rail to the wall and braced his other leg against the wall of the shaft. The plaintiff then described how when working in this position he slipped and his body twisted over his right knee. He had said in his evidence that from previous training they would have used a safety belt, that is a large leather belt attached by a chain to another belt attached to the object being climbed so one cannot fall away. No such belt was provided and, as can be seen from the pleadings, one of the allegations of negligence on the part of the defendant or its servants was the failure to provide a safety belt or other safety appliance. Looking at the plan of an Otis passenger elevator which is on the case file and using ordinary common sense, it would seem to be plain beyond question that the proper and safe method of cleaning the guide rails is to stand on top of the car. The plaintiff himself said:

> "The normal method of cleaning the guide rails is for the person to stand on the roof of the car and for it to be moved up and down. If used that is a safe method."

Mr. George Turfus who was in charge of the installation of the lifts in the I.P.S. building said in his evidence:

> "I would think that there would be no question of the plaintiff thinking he should scale up. Climbing the guide rails can be very dangerous; I would never authorise it. . . . The mechanics are trained men and are supposed to know their jobs and how to carry them out. Our trained mechanics know safety precautions. Working from the roof of the car is a safe system."

Concerning the use of safety belts Mr. Turfus said:

> "Belts in lift shafts have been found to slip and we have never used them. They might give false confidence to the workmen using them."

Why therefore did the plaintiff not use the obvious safe method? In the plaint it is stated

> ". . . the defendant's foreman one Ian McMurdoe ordered the plaintiff to climb the guide rails on which the lift was expected to slide. . . ."

Unfortunately Mr. McMurdoe was not available to give evidence but I observe that nowhere in his evidence did the plaintiff say in terms that Mr. McMurdoe ordered him to climb the guide rails. Furthermore Mr. Turfus said in his evidence that he certainly did not tell McMurdoe that the cleaning of the guide rails was to be done by climbing up to save time. I do not think that it is in dispute that there was no power laid on to the lift on the first Saturday, the 10th; Mr. Turfus said "we were moving it manually". The situation appeared to be the same on the following day when the plaintiff had to clean the guide rails; the plaintiff said he had to climb as he did because the lift was having things done to it by Mr. McMurdoe and they were working against time. He added that the lift could have been moved manually had not Mr. McMurdoe been working on it but it is not at all clear how Mr. McMurdoe's work inside the car making final adjustments, which was the plaintiff's evidence, would prevent the slow movement up or down of the lift for the convenience of the

persons standing on top of the car cleaning the rails. There is no doubt that the job was a rush job and I think it very probable that to save time the plaintiff decided of his own accord to climb the guide rails. As to the particulars of negligence set out in paragraph 10 of the plaint though the urgency of the work necessitated overtime I do not think that amounts to negligence in "rushing the cleaning of the rails", whatever that expression may mean. As to negligence in failing to watch and supervise the cleaning I think that the defendant company was entitled to assume that the plaintiff whom they had employed for some months was competent to clean the guide rails without someone standing over him all the time.

There is undoubtedly a safe method of cleaning guide rails and that is to stand on the roof of the car and move up or down as required and when there is no car to use scaffolding. It seems to me from the evidence of Mr. Turfus that a safety belt may very well prove to be unsafe; no other safety appliance was mentioned during the case. In my view the defendant company did not fail to take proper precautions for the safety of the plaintiff and I am satisfied that the allegations of negligence are not made out and that the claim under this head must also fail.

The largest sum claimed by the plaintiff arises out of the breach after a few months of his contract of service which the plaintiff claims was for a fixed period of three years. It appears from the evidence that the plaintiff sought employment and went to see Mr. Sardano, the managing director of the defendant company sometime towards the end of June, 1966. The plaintiff said that Mr. Sardano told him at the interview that the defendant had two types of contracts, one of two years and the other of three years. Mr. Sardano's evidence however was to the effect that no fixed period of service was agreed in the contract. The plaintiff said he told Mr. Sardano that he would rather work for the three year contract period. The plaintiff accepted the offer of employment in the following terms in his letter to Mr. Sardano:

> "Thank you for interviewing me on Saturday 1st July for the job of mechanic with your company. I accept your offer and fully understand the terms and conditions you explained to me. I have already written my resignation from my present job and I will be able to start work with your company on the 15th August, 1966, if this is convenient to you."

To this Mr. Sardano replied:

> "I have your letter of July 13th and confirm we are pleased to have you starting work as from the 15th August, 1966. Looking forward to have you as member of our staff. I feel sure you will be doing well, and wish you the best of luck."

It is of course the plaintiff's contention that the document shows that the contract of service was for a fixed period of three years, since the plaintiff exercising the choice given by the defendant chose contract B. Looking at the document it is clear that what the plaintiff chose was a condition concerning paid leave and passage allowance to which he would be entitled after three years' service. This condition is set out in clause 7 B of the document; it is not by itself the contract of service agreed by the parties and it is wrongly called in the document contract B. There is nothing in the letters between the plaintiff and Mr. Sardano or the document which shows that the parties agreed expressly that the plaintiff's contract of service should be for a period of three years nor do I think that it can be implied from the document that the contract was for such period. In my view this was an indefinite hiring terminable by reasonable notice at any time. Being an indefinite hiring it is what is termed a general hiring and the old rule was that a general hiring, without more, was a hiring

for a year certain and could not be determined by notice before the end of the year. However, the document clearly shows that it was in the contemplation of the parties that the contract could extend for two, three or more years. Mr. Vohra has argued that the case of *Storey v. Fulham Steel Works Co.* (1907), 24 T.L.R. 89 is in his favour, but in that case there was no question that the defendant company employed the plaintiff for a period of five years as works manager. Because of sickness the plaintiff in that case was dismissed before the five years period elapsed. If I am wrong in holding in this case that there was not a contract for three years then it appears from *Storey's* case that the plaintiff would be entitled to damages for breach of contract. However as I have said, in my view, this was a hiring for an indefinite period, subject to reasonable notice which though it does not arise in this case, I consider was given. Such being my view it follows that the plaintiff's claim for damages for breach of contract must also fail and in the result there will be judgment for the defendant with costs.

Judgment for the defendant with costs.

For the plaintiff:
YP Vohra
Vohra & Vohra, Nairobi

For the defendants:
AF Morrison
Archer & Wilcock, Nairobi

Nduto v Republic
[1969] 1 EA 575 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	2 April 1969
Case Number:	178/1969 (91/69)
Before:	Mwendwa CJ and Wicks J
Sourced by:	LawAfrica

[1] Criminal Practice and Procedure – Commencement of proceedings – Corruption – Prevention of Corruption Act (*Cap.* 65) (*K.*) *– Consent to prosecution required – When consent to be filed in court.*

[2] Criminal Practice and Procedure – Corruption – Prevention of Corruption Act (*Cap.* 65) (*K.*) *– Consent to prosecution required.*

[3] Evidence – Unsworn statement by accused – Whether adverse comment on by trial magistrate improper.

Editor's Summary

The appellant was convicted under s. 3 (2), Prevention of Corruption Act, after having given money to a police officer who had arrested him for a number of motoring offences. This appeal was based on the grounds that (*a*) the necessary consents to the prosecution required by the Act had not been given and the prosecution was therefore a nullity; (*b*) the magistrate had misdirected himself on the facts; and (*c*) the magistrate had adversely and improperly commented on the fact that the appellant gave an unsworn statement.

Held –

(i) although there was no evidence that the necessary consent to the prosecution had been obtained when the appellant appeared before the magistrate on December 9, 1968, a fresh charge was submitted on January 27, 1969, and the consent of the Director of Public Prosecutions to prosecute was obtained before the appellant was formally charged and his plea recorded, so that the proceedings were valid;

(ii) there was, as a whole, overwhelming evidence that the appellant was guilty;

(iii) the magistrate was entitled to comment adversely on the fact that the appellant gave an unsworn statement, and the extent that the magistrate did so was proper.

Obiter: if the necessary steps to prosecute required by the Prevention of Corruption Act (Cap. 65) (K.) have not been obtained the taking of a plea is a nullity.

Appeal dismissed.

No cases referred to in judgment

Judgment

Mwendwa CJ: read the following judgment of the Court: The appellant was convicted by the magistrate on one charge of corruption contrary to s. 3 (2) of the Prevention of Corruption Act (Cap. 65, Laws of Kenya) and sentenced to serve a term of imprisonment of twelve months. He appeals against the conviction and sentence.

There is a preliminary point which we must refer to first and that is the ground of appeal which alleges that the proceedings in the magistrate's court were a nullity for the reason that the consent of the Deputy Public Prosecutor to institute the proceedings was placed on the record after the appellant's plea was taken. Section 12 of the Prevention of Corruption Act provides:

> "A prosecution for an offence under this Act shall not be instituted except by or with the written consent of the Attorney-General or Solicitor-General:
>
> Provided that a person charged with such an offence may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody or on bail, notwithstanding that the consent of the Attorney-General or Solicitor-General to the institution of a prosecution for the offence has not been obtained, but no further or other proceedings shall be taken until that consent has been obtained."

and limited power to give such written consent was delegated to the Deputy Public Prosecutor by Legal Notice No. 338/63. From the record it appears that the appellant appeared before the magistrate on December 9, 1968, when he was charged with an offence and, from his answer, it appears that the charge was similar to that on which he was subsequently convicted. The magistrate entered a plea of not guilty and there is nothing on the record to show whether or not the written consent of the Attorney-General or Solicitor-General had been obtained. On January 27, 1969 the appellant again came before the magistrate when, according to the record, the prosecution sought to submit a fresh charge together with the consent of the Director of Public Prosecutions to prosecute. The magistrate made a note that the fresh charge was submitted and substituted, and this fresh charge was read over and explained to the appellant, he made a reply, and a plea of not guilty was entered. Mr. Shah, who appears for the appellant, submits that the proceedings on January 27 were a continuation of those on December 9, that section 12 of the Act is mandatory in its terms and the defect cannot be cured by putting in the consent to prosecute after the appellant has pleaded. We cannot agree with Mr. Shah on the facts. From the record it is clear that the charge put in on January 27 was a completely new charge, it had no relation to the previous charge, and a separate plea was taken on it. We are unable to express any definite opinion

on the charge to which the appellant pleaded on December 9. All we can say is that on the record there is no indication whether or not the Attorney-General's consent had at the time been obtained, but it seems that if it had not the effect of the concluding words of the proviso to section 12 of the Act "No further or other proceedings shall be taken until that consent has been obtained" was to have made the taking of a plea a nullity. We are not concerned with these possibilities for the reason that the charge on which the appellant was convicted was a completely new one, the written consent of the Deputy Public Prosecutor had been obtained and, after that, the appellant was formally charged and his plea recorded. We can find nothing in this ground of appeal.

The main grounds of appeal are on the facts. The undisputed facts are that on December 7, 1968 the appellant was driving his vehicle on the Kitui Road when he was stopped by two police constables and asked to produce his driving licence. From this point the evidence for the prosecution and that of the appellant differs. The evidence of the police constables was that the appellant said he had a learner's licence which he produced. The appellant was asked where the licensed driver was and he replied that there was none. He was then informed that he would be charged for not having a licensed driver with him, for carrying passengers without a licence, and for not displaying "L" plates on his vehicle. The appellant was asked for his identity card. One constable, P.C. Makebo, moved to the back of the vehicle to count the passengers, and the appellant then got out of his vehicle and moved to the back of it. P.C. Chepchoke, the other constable, went with him and, as he was copying down the particulars of the appellant's identity card in his notebook, he heard P.C. Makebo say "What is this money you are putting in his pocket". P.C. Chepchoke felt something in his hip pocket and found a Shs. 10/- note in it. P.C. Chepchoke turned round and saw P.C. Makebo holding the appellant who said "Please you can have that for tea and please forgive me". P.C. Makebo put the Shs. 10/- note in the notebook and told the appellant to turn round his vehicle to go to the police station and, in addition to the other charges, he would be charged with bribery. The appellant then got into his vehicle and drove off. The constables being on foot could do nothing to stop the appellant and they went and reported the matter at their police station. The appellant's evidence was that he handed his learner's licence and his identity card to P.C. Chepchoke and there was a Shs. 10/- note in the identity card. The appellant got out of his vehicle and asked for the return of his identity card. P.C. Makebo then took the ignition keys from the appellant who asked P.C. Chepchoke to return the identity card so that he could remove the Shs. 10/- note. P.C. Chepchoke asked the appellant why he had put the Shs. 10/- note there. The appellant formed the opinion that the constables were drunk and considered it wise not to exchange words with them. Soon after this a small car came along, being driven towards the town, the constables stopped it, returned the ignition keys to the appellant telling him to report to the police station, and went off in the small car. The appellant said that the person in the front seat of his car saw the constables give him back the ignition keys. The appellant called as a defence witness one Mr. Joel Nyioki, a preacher, whose evidence was that he was a passenger sitting in the front seat of the appellant's vehicle when it was stopped by P.C. Chepchoke and P.C. Makebo, whom he identified. The witness heard the constables ask the appellant for his licence and heard him reply that he had none and gave them a chit saying he was a learner. The appellant gave the constables his identity card. The constables went away and the appellant got out of his vehicle saying he was going to get back his identity card from the constables. When the appellant came back he said that the constables had given him back his identity card but kept his Shs. 10/-. The witness said that from where he was sitting he could not know what had happened between the appellant and the constables. The witness continued that "In fact the accused

held the ignition keys all the time. He never gave them to the constables" and then said "when the accused got back into the car the police constables were still on the road. Accused said 'let's go' and he drove off. We left the police constables standing on the road." In cross-examination the witness said that when the appellant got back in his vehicle he told the witness he was going to be charged in connection with the money, and, referring to the allegation that the police constables were drunk, the witness said that they appeared perfectly normal to him.

It is seen that there is a clear conflict between the evidence of the constables and the appellant. In his judgment the magistrate said that the evidence of the defence witness, Mr. Joel Nyioki, did not support the appellant's evidence for the reason that the witness did not see what occurred between the appellant and the constables when the appellant was out of his vehicle, that the evidence of the appellant was inconsistent with that of the constables and in these matters the witness directly contradicted the evidence of the appellant and supported the evidence of the constables. These instances were stated to be:

> "(1) Accused said that the constables were drunk. D.W.1 says they did not appear to be so.
>
> (2) Accused said that the ignition keys were taken by the constables and then handed back to the accused. Although little significance attaches to this issue, D.W.1 says the keys never left the accused's possession.
>
> (3) Accused said that the constables went off in another car back to Machakos leaving him the accused then to drive home. D.W.1 denies this and confirms the evidence of the constables."

The first ground of appeal in which may be included the seventh was that the magistrate misdirected himself in saying that the evidence of Mr. Joel Nyioki supported the prosecution case and in saying that the evidence of the witness did not support the defence case and that the evidence of the witnesses supported the defence case in one of the most important aspects of the case, and that is that the constables made no effort to stop the appellant when he drove away his vehicle. The second ground was that the magistrate failed to appreciate that the evidence of Mr. Joel Nyioki suggested the improbability of the evidence of the constables in that had there been any conversations relating to the alleged bribery the witness must have heard the conversation; and the third ground was that the magistrate placed undue emphasis on the discrepancies between the evidence of Mr. Joel Nyioki and the appellant, and that he misdirected himself in placing reliance on the contradictions to the extent of disbelieving the defence. Looking at the evidence which we have set out above, it is abundantly clear that the evidence of Mr. Joel Nyioki did support the evidence of the constables and it contradicted that of the appellant generally and on the particular points referred to by the magistrate. As P.C. Makebo said, the appellant drove off his vehicle without warning and we are unable to envisage any effective action that the two police constables, who were on foot, could have taken to stop the appellant doing so. Far from the evidence of Mr. Joel Nyioki suggesting the improbability of the evidence of the constables in the way suggested in the ground of appeal, the evidence of the witness that from where he was sitting he could not know what had happened between the appellant and the constables, and that the appellant after he had driven off, told the witness he was going to be charged in connection with the money, fully supported the probability of the truth of the constables' evidence. In our view the consistency of the evidence of Mr. Joel Nyioki and that of the constables, and the absence of any conflict in that evidence, coupled with the discrepancies between the evidence of the appellant and that of his witness, entitled the

magistrate to disbelieve the evidence of the appellant. We can find no substance in these grounds of appeal.

The fourth ground of appeal was that the magistrate commented adversely on the fact that the appellant gave an unsworn statement, the fifth ground referred to the magistrate's reference to the entry in the occurrence book at the police station, and the sixth ground suggested that there was no evidence to indicate that the appellant was a wanted man. As far as the fourth ground is concerned the magistrate was entitled to comment adversely on the fact that the appellant gave an unsworn statement and we are satisfied that the extent to which he did so was proper. On the fifth ground we are satisfied that the magistrate properly referred to the matter, it having arisen out of cross-examination of the constables by the defence, and on the sixth ground we must point out that there was positive evidence that the appellant was a wanted man. As P.C. Makebo said, the appellant drove off without warning. "We had already arrested him. We did not expect him to try and escape."

Looking at the evidence as a whole we are satisfied that there was overwhelming evidence of the appellant's guilt, which was supported by the evidence of the witness who was called in his defence, and the appeal against conviction must fail.

Turning now to the appeal against sentence, this was a case where the appellant attempted to corrupt two police officers and when they took the action which trustworthy police officers could be expected to take, he drove off in his vehicle. At his trial the appellant's version of the facts was completely destroyed by the evidence of his own witness. Under such circumstances we are forced to observe that a sentence of twelve months' imprisonment far from being excessive was very lenient.

The appeals against conviction and sentence are dismissed.

Order accordingly.

For the appellant:
AB Shah
Shah & Parekh, Nairobi

For the respondent:
OP Nagpal (Senior State Counsel, Kenya)
Attorney-General, Kenya

Wahome v Republic
[1969] 1 EA 580 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	21 February 1969
Case Number:	1344/1968 (92/69)
Before:	Mwendwa CJ and Trevelyan J
Sourced by:	LawAfrica

[1] Criminal Practice and Procedure – Charge – Defect – Theft by servant – Incorrect amount stated in charge – No prejudice to defendant thereby – Application of Criminal Procedure Code (*Cap.* 75), *s.* 382 (*K.*).

[2] Criminal Practice and Procedure – Judgment – Magistrate's judgment perfunctory – Conviction not for that reason to be invalidated.

[3] Evidence – Corroboration – Whether evidence of bus inspectors requires corroboration when bus conductor charged with theft as a servant.

Editor's Summary

A conductor on a Nairobi to Mombasa bus collected two Shs. 9/- fares but refused to issue tickets therefore and failed to account for the money to his employers. The amount stolen was stated in the charge to be Shs. 13/30. The case for the defence was that the prosecution's chief witness had conspired to falsify the evidence. The conductor was convicted and appealed on the grounds that: (*a*) the magistrate had misdirected himself on the facts; (*b*) the evidence of the prosecution witness should have been corroborated; and (*c*) the magistrate had shifted the burden of proof.

Held –

(i) on the facts found by the magistrate the appellant was manifestly guilty;

(ii) although the charge was poorly framed, the appellant was not thereby prejudiced;

(iii) there was no question of the prosecution witnesses having instigated the offence, and their evidence did not require corroboration;

(iv) although the magistrate had made a number of unfortunately worded comments on the case for the defence it was not intended to, and did not, put the onus of proof on the defence in any way;

(v) the magistrate might be criticised for the perfunctory way in which he expressed himself in his judgment and for not checking the charge sheet, but this did not mean that the conviction was wrong or ought to be invalidated.

Appeal dismissed.

Cases referred to in judgment:

(1) *Habib Kara Vesta and Others v. R.* (1934), 1 E.A.C.A. 191.

(2) *R. v. Hasham Jiwa* (1949), 16 E.A.C.A. 90.

(3) *R. v. Dalpatram Havishanker Mehta* (1948), 15 E.A.C.A. 123.

(4) *R. v. Hopley* (1949), 16 E.A.C.A. 110.

(5) *Okethi Okale and Others v. R.*, [1965] E.A. 555.

(6) *Ndege Maragwa v. R.* (E.A.C.A. Criminal Appeal No. 156 of 1964) (unreported).

(7) *Samwiri Senyange v. R.* (1953), 20 E.A.C.A. 277.

Judgment

Mwendwa CJ: read the following judgment of

the Court: The appellant was charged contra s. 281 of the Penal Code with theft as a servant and, following his conviction and sentence thereupon, he appeals to this court relying upon a number of grounds. But whilst the judgment of the learned magistrate may be said not to have been as full and as complete as it should have been, we believe that the appellant was properly convicted.

The charge was poorly framed, but the appellant was charged, and well knew that he was charged, with stealing money which came into his possession on account of his employers named in the charge. We are unable to understand why the amount stolen was stated as Shs. 13/30. We know how this sum was arrived at but the amount which the appellant stole was Shs. 18/- made up of two sums of Shs. 9/- and this should have been charged in two separate counts. Were we of the belief that the appellant was at all prejudiced by this we would consider whether a retrial ought not to be ordered. There has been no prejudice to the appellant, however, and as we understand it, the point was not taken in the court below. Section 382 of the Criminal Procedure Code would, therefore, need to be applied in any event in the circumstances obtaining.

The short facts which the magistrate found in his scanty judgment were that two men employed for the purpose of checking upon the conduct and honesty of omnibus conductors boarded the vehicle on which the appellant was the conductor, tendered the fares to Mombasa, i.e. Shs. 9/- each, and were given no tickets for their money; and that after they remonstrated with him one was given a shilling to get some tea and then a 50 cent ticket and the other got nothing. It seems to us that once the magistrate accepted these facts and it was shown that the money never reached the conductor's employers, no other conclusion than that theft had been committed by him could have been drawn. The evidence of these two men was challenged but it is inherent from the judgment that the magistrate believed what they said and we see no reason why he should not have done so. At one stage it was suggested that their evidence needed to be corroborated but it did not: *Habib Kara Vesta and Others v. R.* (1934), 1 E.A.C.A. 191 and *R. v. Hasham Jiwa* (1949), 16 E.A.C.A. 90. There are cases where corroboration should be sought as was indicated in *R. v. Dalpatram Harishanker Mehta* (1948), 15 E.A.C.A. 123 but on the facts of the instant case corroboration was not required. There are categories of agents provocateurs: *Habib Kara Vesta* (ubi *supra*) and as was pointed out in *R. v. Hopley* (1949), 16 E.A.C.A. 110 there is a difference, limited be it noted to the degree of criminality, between a person who of his own volition commits an offence and one who commits his offence in the face of temptation. Here there is no question of the two witnesses having instigated the offence charged or any offence.

It was the defence case that the two men, for a reason which must be self-enrichment or promotion conspired together to falsify the case against the appellant. Upon the evidence the magistrate was entitled to reject the same. It is at least for note that if, as the appellant would have it, the 50 cents ticket was not issued until the next day, the witness obtained it one day and, with the assistance of his confederate falsified a story about a journey said to have been made the previous day. This would certainly have been a very risky thing to do and was, in any event, more complicated than was necessary for a criminal exercise such as has been suggested. But, apart from this, the appellant relies on his waybill to support his case that the ticket for 50 cents was issued the following day. At the trial the issue was clouded by the evidence about the ticket machine being out of order, i.e. that it put out tickets numbered one more than was correct. It appears to us that there is an additional piece of evidence against the appellant which was not commented upon by the magistrate. This appears at the top of page 16 of the typescript, and is part of the evidence given by the Mombasa cashier. It says:

> "I made three copies of M.F.I.4. This is the original. I made a record of 5 cent units reading at 22708 and 1/- units at 61500 on M.F.I.4. I got these figures from a machine like M.F.I.1. These were the last figures on the machine.
>
> XXD by Malik:
>
> When I receive money I look at the first waybill. I do not make any entries on it. This, M.F.I.2 is the waybill I look at. I get the starting figures for M.F.I.2."

It will thus be observed that the witness was not challenged about the numbers 22708 and 61500. Yet, if one looks at the waybill kept by the appellant, these numbers could not have been apparent at Mombasa for the money for them was not taken for the journey to Mombasa but for that which began at Mombasa on the return journey to Nairobi. The appellant's waybill must, therefore, have been wrong, and, in the circumstances, deliberately false. Mr. Malik, in the note which we took of his submission, said:

> "Couldn't have issued 3716 as the witnesses alleged. If not issued on the way to Mombasa their story falls flat. It is the only scrap of written evidence."

In our view, the appellant's waybill cannot be said to reflect accurately his true takings on the way to Mombasa. Moreover, it is apparent that ticket number 3716 was indeed issued before Mombasa was reached so that the defence case was palpably false. As we see it the only proper verdict should have been one of guilt.

It is further argued that the magistrate shifted the burden of proof from the prosecution to the defence. What he said was this:

> "Although I appreciate that all the accused has to do is to create a reasonable doubt in the judicial mind, I am surprised that he could press such an extravagantly unlikely story in his defence as vigorously as he has done."

This was an unfortunately worded comment but we do not believe that it was intended to, or did put the onus of proof upon the defence in any way. The comment was made after the magistrate had considered the whole of the evidence and had, albeit rather contemptuously, rejected the defence in favour of that tendered on behalf of the prosecution. We do not, as we read the case, believe that the result of the case was, or could have been, affected by the comment. We draw attention to *Okethi Okale and Others v. R.*, [1965] E.A. 555 where the Court of Appeal repeated the principles set out in *Ndege Maragwa v. R.* (E.A.C.A. Criminal Appeal No. 156 of 1964) (unreported) to the effect that the burden of proof in criminal proceedings is throughout on the prosecution and that it is the duty of the trial judge to look at the evidence as a whole.

The point was taken that there should have been no mention of other passengers having paid their fares without being given tickets. We think that the evidence was, in the circumstances, technically admissible though we would say that as it was not necessary to the prosecution case it would have been better had it not been led. But, as we see it, the admission of this evidence could not have affected the results of the case because it was given by the same witnesses who spoke to the receipt of the two sums of Shs. 9/-. The evidence impugned could not have had the effect of making the magistrate believe what they said.

It is also said that the magistrate failed to deal adequately with all the evidence and the points for determination. The magistrate may be criticised for the

perfunctory way in which he expressed himself in his judgment and for not checking the charge sheet. However, even if we were to hold that he did not prepare his judgment in the form decreed by s. 169 of the Criminal Procedure Code this would not, of itself, mean that the conviction of the appellant was wrong or is to be invalidated: see *Samwiri Senyange v. R.* (1953), 20 E.A.C.A. 277. We are of the opinion that upon the evidence the guilt of the appellant was manifest and it would be a travesty of justice to say that his guilt was not established beyond reasonable doubt.

In relation to the matter of sentence it is for comment that offences such as that which the appellant committed must be none too easy to detect. The sentence imposed was well merited for the calculated and deliberate fraud which the appellant saw fit to perpetrate upon his employers.

There is no reason for us to interfere with the conviction or sentence and we dismiss the appeal accordingly.

Order accordingly.

For the appellant:
MZA Malik
AH Malik & Co, Nairobi

For the respondent:
S Sangale (State Counsel, Kenya)
Attorney-General, Kenya

Munene v Republic
[1969] 1 EA 583 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	21 March 1969
Case Number:	1302/1968 (94/69)
Before:	Mwendwa CJ and Wicks J
Sourced by:	LawAfrica

[1] Medical Practitioner – Discipline – Erasure from Register for professional misconduct by a first offender – Period before re-instatement may be considered.

Editor's Summary

The Medical Practitioners and Dentists Board ordered that the appellant's name, he being a medical practitioner, be erased from the Register and that for a period of two years no consideration for re-instatement be permitted. The appellant (a first offender) pleaded guilty to and was found guilty of

infamous and disgraceful conduct under s. 23 (i) of the Medical Practitioners and Dentists Act, in that he failed to record in a prescribed book the names of persons to whom over a period of some four months 24,127 vials of procaine penicillin were supplied, contrary to s. 31 of the Pharmacy and Poisons Act. The Chairman stated that several doctors had been charged with similar offences and therefore leniency would be misplaced. On appeal against the order, Counsel for the Board stated that only one doctor had recently been previously charged with a similar offence.

Held – The order of erasure from the Register should be upheld; but reinstatement "after six months" should be substituted for "after two years".

No cases referred to in judgment

Judgment

The following judgment of the Court was read by **Mwendwa CJ:** The appellant appeared before the Medical Practitioners and Dentists Board on August 20 on a charge of infamous and disgraceful conduct in his professional capacity contrary to s. 23 (i) of the Medical Practitioners and Dentists Act, to which he pleaded guilty. The Board ordered that the appellant's name be erased from the Register and that no application for re-instatement of the appellant's name on the Register would be considered within a period of two years. He appeals against the order erasing his name from the Register and the period of that erasure.

The particulars of the charge were that the appellant:

> "Between the 1st January, 1968, and the 26th of April, 1968, within the Central Province being a duly qualified medical practitioner supplied approximately 24,127 vials of procaine penicillin a Part I poison to persons unknown without making an entry in the prescribed book in respect thereof as required by section 31 of the Pharmacy and Poisons Act, Cap. 244 of the Laws of Kenya."

The Chairman of the Board delivering the decision of the Board said:

> "We are very perturbed that in spite of sending our Drug Inspectors round to check and warn people of the necessity of keeping registers, that it is even now suggested that we should send directives. This Board is established by law to enforce the law and once a law is passed and published there is no obligation to the Ministry of Health to issue directives. We have had several doctors before this Board charged with similar offences and the Board now finds it difficult to agree to be lenient, even if that plea is coupled by the fact that you have been involved in civic duties and other assistance to voluntary organisations. The Board considers that if you undertake other duties in addition to those of your profession, it is your duty either to reduce such activities which make it difficult for you to keep effective control on your professional obligation, or you reduce your practice to be in keeping with what other duties you may have to perform, whether they are of public nature or not. In view of these increasing offences, that tend to show both to the profession and to the public an increasing laxity of the responsibility that is placed on doctors, the Board has decided to erase your name from the Register of the Medical Practitioners. The Board has decided that no application will be considered for re-instatement within two years."

Mr. Nagpal, Senior State Counsel, who appears for the Board, informs us that he is unable to support the statement of the Chairman of the Board that several doctors have been charged before the Board with similar offences, because there has been only one previous case and that was of a doctor who was charged before a magistrate in 1962 in connection with tablets coming within the sulphur group when he was fined Shs. 920/-, and that in 1967 the same doctor was charged before the Board with two offences one relating to tablets of the sulphur group and the other in connection with penicillin, and his name was erased from the Register. Apart from this there is only one other case and that concerns Dr. J. M. Mwangi, whose appeal we will consider after we have disposed of this case. Dr. Mwangi's case was heard on June 11 and 12, 1968, and, as the offence in this case was alleged to have been committed between January 1, 1968 and April 26, 1968, that cannot be considered a previous similar offence. It is within the competence of the Board to send warning letters and, on charges, to admonish a doctor and it is reasonable to assume that, there having been only one previous case of a doctor being charged before the Board in relation to an offence concerning procaine penicillin, the Chairman's

reference to several doctors having been before the Board charged with similar offences is an error. We agree that, under circumstances where the incidence of an offence increases despite the award of punishment other than that of the erasure of a doctor's name from the Register, it could be just and proper to enhance the penalty to one of erasure from the Register. However, in our view in the first cases where such a course is adopted the period of erasure can properly be reasonably short. A short erasure would mark the concern with which the increase in the number of cases is viewed, it would operate as a warning that future violations are likely to result in erasure from the Register. Moving from admonition to short periods of erasure would also provide scope for increasing the duration of erasure for second convictions and for cases where doctors have committed offences in the full knowledge that the punishment of erasure has been imposed in previous cases. The doctor whose name was erased from the Register in 1967 not only had a previous conviction but he was convicted on two charges. In this case the appellant is a first offender and he was convicted on one charge. Under the circumstances we have mentioned we consider that an order erasing the appellant's name from the Register being proper a further order that an application would be considered for the re-instatement of the appellant's name on the Register after six months would have been just and reasonable. We, therefore, reduce the period of erasure to one of six months. We must make it clear that in reducing the period of the erasure we in no way detract from the seriousness with which such cases should be viewed and, had several doctors been before the Board on similar charges whose names had been ordered to be erased from the Register, we do not say that an order of erasure for two years would not have been proper.

There is one matter which we must refer to and it is this. The decision of the Board in this case was delivered on August 20, 1968. Mr. Swaraj Singh, who appeared for the appellant, informs us that he applied to the Board for a copy of the record for the purpose of filing this appeal by letter six days later, this is on August 26. Five reminder letters were sent and one call made by an advocate on the Secretary to the Board, before the copy of the record was received on November 25, 1968. The appellant had a right to appeal to this court and the effect of the delay was that he was delayed in his ability to launch his appeal for a period of over three months. It is not in the interests of justice that a person should suffer a penalty over such a long period during which his appeal is pending. In this case the appellant pleaded guilty and the record was short. We consider that, even in the case of a long record, it should be possible to prepare copies of it for the purposes of appeal within two weeks of the date of request.

The decision of the Board is varied in that the period of "2 years" is deleted and a period of "6 months" substituted. That is, an application for re-instatement of the appellant's name on the Register will now be heard.

Order accordingly.

For the appellant:
Swaraj Singh
Swaraj Singh, Nairobi

For the respondent:
OP Nagpal (Senior State Counsel, Kenya)
Attorney-General, Kenya

Adiedo v Republic
[1969] 1 EA 586 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	2 April 1969
Case Number:	1266/1968 (96/69)
Before:	Mwendwa CJ and Wicks J
Sourced by:	LawAfrica

[1] Criminal Practice and Procedure – Adjournment – Application by advocate for time to take instructions – Magistrate offers 1½ hour adjournment – Not unreasonable.

Editor's Summary

The appellant appeared and pleaded not guilty to criminal charges on September 14, 1968. On October 15, he appeared unrepresented and the hearing of the case continued for one day and was then adjourned to October 24. On that day an advocate appeared for the appellant, stated that he had only been briefed the previous afternoon and applied for an adjournment. The magistrate offered a 1½ hour adjournment only. This was refused and the appellant then conducted his case himself, cross-examined witnesses and gave evidence on oath. The appellant appealed alleging that the magistrate erred in refusing to grant an adequate adjournment.

Held – The right of the accused to be represented by the advocate of his choice had not been infringed.

Appeal dismissed.

Cases referred to in judgment:

(1) *R. v. Mary Kingston* (1948), 32 Cr. App. Rep. 183.

(2) *Yusuf Ahmed alias Ursad H. T. Ahmed Farah v. R.*, [1959] E.A. 615.

Judgment

Mwendwa CJ: read the following judgment of the Court: The appellant was convicted by the magistrate on six charges, three relating to each of two cheques. The charges relating to each cheque were, receiving or retaining stolen property contrary to s. 322 (1) of the Penal Code, uttering a false document contrary to s. 353 of the Penal Code, and obtaining goods by false pretences contrary to s. 313 of the Penal Code. He was sentenced to serve a period of imprisonment of a total of four years and he appeals against his conviction and sentence.

There is one matter which we should deal with first. Mr. Ahamed, who appeared for the appellant, contended that the magistrate erred in refusing to grant an adequate adjournment to the appellant to

enable him to arrange for his counsel to represent him at the trial. It appears from the record that the appellant appeared before the magistrate on September 14, 1968, when he was represented by Mr. V. B. Patel. He was charged and pleaded not guilty. On October 15 the appellant appeared before the trial magistrate. His advocate did not appear and he was asked if Mr. V. B. Patel still appeared for him and on his replying that he was not, the trial proceeded and the evidence of Mr. Kozlowski was heard and the case was adjourned to October 24. On that day Mr. Z. Ahamed appeared for the appellant. Mr. Ahamed said he had been briefed only on the afternoon of the day before and asked for an adjournment. The application was opposed and the magistrate refused an adjournment, but said he would grant a short adjournment until 11.00 a.m. for Mr. Ahamed to

take further instructions. It was then 9.30 a.m. so the adjournment offered was 1 ½ hours. Mr. Ahamed said he did not wish a short adjournment and asked permission to withdraw from the case which was granted. It was within the discretion of the magistrate to grant an adjournment and we agree with Mr. Nagpal, who appeared for the State, that this discretion must be exercised bearing in mind that there is a fundamental right that an accused person can be represented by the advocate of his choice. We are referred to the case of *R. v. Mary Kingston* (1948), 32 Cr. App. Rep. 183. In that case counsel had been briefed for the defence but owing to a misunderstanding not involving the defendant he was not present in court when the trial was due to commence. Other members of the bar were present and available, but the judge declined to postpone the trial or to accede to a suggestion made by counsel for the prosecution that one of the other counsel available should be asked to hold the brief of counsel who had been briefed for the defence and the appellant was in the result tried as an unrepresented person. The appellant in that case, after protest, did not cross-examine any of the witnesses and when she was called on for her defence and the position explained to her said, "I could say a lot, but I just cannot put it into words, so I cannot say anything". It was held that the course adopted was tantamount to depriving the appellant of the right she had to be defended by counsel, and the conviction was quashed. We are also referred to the case of *Yusuf Ahmed alias Ursad H. T. Ahmed Farah v. R.*, [1959] E.A. 615. In that case on May 26, 1959, the appellant pleaded to the charges, and the assessors were selected when the appellant applied for and obtained an adjournment to engage an advocate. The appellant was told that the case would be adjourned to June 3 and that no further adjournment would be given. On June 3 the appellant sought a further adjournment as he had received a letter from an advocate that he would not be available at the place of trial before June 18. The trial judge refused an adjournment on the grounds that, owing to other cases an adjournment would have to be for a long period, the uncertainty of the appellant being able to pay for the services of an advocate in the end, and for other reasons. At the trial the appellant cross-examined the witnesses at length and gave evidence on oath and was convicted. It was held that the trial judge had a discretion whether or not to grant an adjournment and it was not considered that he had exercised his discretion on any wrong principle. In the case before us the appellant was represented by an advocate when the pleas were taken, and he was represented by another advocate when the trial was resumed on October 24. At that hearing the magistrate at 9.30 a.m. said he would grant an adjournment until 11.00 a.m. In the circumstances of this case we are satisfied that 1 ½ hours was ample time during which Mr. Ahamed could have taken instructions. At the trial the appellant cross-examined the prosecution witnesses at length and he gave evidence on oath and we do not consider that the magistrate exercised his discretion on any wrong principle.

[The Court then dealt with the merits of the appeal and concluded:]

The appeals against both conviction and sentence are dismissed.

Order accordingly.

For the appellant:
SK Ahamed
Ahamed & Ahamed, Nairobi

For the respondent:
OP Nagpal (Senior State Counsel, Kenya)
Attorney-General, Kenya

Shangara v Farm Vehicles Ltd
[1969] 1 EA 588 (HCT)

Division:	High Court of Tanzania at Arusha
Date of judgment:	30 September 1968
Case Number:	8/1968 (97/69)
Before:	Platt J
Sourced by:	LawAfrica

[1] Civil Practice and Procedure – Trial – Appearance – Advocate for defendant present without his client – Judgment given for plaintiff on ground of non-appearance by defendant – On appeal appearance by advocate held lawful appearance – Civil Procedure Code 1966, *O*. 3, *r*. 1; *O*. 5; *r*. 5; *O*. 9, *r*. 6; *O*. 17, *r*. 2 (*T*.).

Editor's Summary

At the trial of a civil suit in the magistrate's court the defendant was absent, but his advocate was present and stated that he was ready to proceed with the hearing. The plaintiff asked for and obtained judgment under O. 9, r. 6 (1) (*a*) (ii) (B) on the ground that the defendant had not "appeared" within the meaning of that rule. The defendant appealed.

Held – The appearance by the advocate was a lawful appearance (*the Land Officer v. Abdulrasul Jivraj* (2) applied).

Appeal allowed.

Cases referred to in judgment:

(1) *Khedu Naek and Others v. Rajib Ray* (1927), A.I.R. Patna 291.

(2) *The Land Officer v. Abdulrasul Jivraj* (1921–1952), 1 T.L.R. (R.) 410.

Judgment

Platt J: This is an appeal from the order of the learned Senior Resident Magistrate in the District Court of Kilimanjaro in which he gave judgment for the plaintiff on the grounds that the defendant had failed to appear in court on the date set down for the hearing of this suit. The plaintiff/respondent had sued the defendant/appellant for Shs. 319/15 being the balance of the account due by the defendant/appellant to the plaintiff/respondent for goods sold and delivered and work done at the defendant's request. The defendant/appellant then filed a written statement of defence which I shall set out as some arguments were directed to it:

> "2. That, with regard to paragraph 3 of the plaint, the defendant denies being indebted to the plaintiff in the sum sued for or any part thereof and states:

(*a*) that the plaintiff has failed to give credit for the sum of Shs. 159/10 being payments by cheques drawn on the Ottoman Bank, Moshi and duly met on presentation namely cheque No. 155899, dated 3/3/66 for Shs. 32/40, Cheque No. 452733, dated 18/3/66 for Shs. 71/80, Cheque No. 452743, dated 15/4/66 for Shs. 27/- and Cheque No. 451838, dated 29/5/66 for Shs. 27/90.

3. The defendant further states:

(*a*) that his vehicle was purchased new in January 1964 and that in May, 1964 he proceeded to England on a banking course and returned in November, 1964 having deposited his car with the plaintiff for storage and safe custody and

(*b*) that during his absence the plaintiff, without his knowledge and

authority and in breach of their obligation as custodian, removed a part or parts from his vehicle and fitted them to other vehicles taken in for repairs.

4. The defendant also denies liability for the sum of Shs. 113/50 claimed for work and materials as per Invoice No. 14734, and states that such work was not required or authorised by the defendant whose vehicle had been put in for lubrication service only.

5. The defendant also states that the sum of Shs. 335/85 charged under Invoice No. 14529 and Shs. 402/- charged under Invoice No. 14733 have been wrongly debited to his account."

No reply was filed and the suit came on for hearing on February 29, 1968.

On that date the defendant was personally absent but Mr. Reid of counsel appeared in court on his behalf. Mr. Oza of counsel applied to the court for judgment to be entered for the plaintiff by virtue of the provisions of O. 17, r. 2 and O. 9, r. 6 (1) (*a*) (ii) (B) of the Civil Procedure Code. Mr. Reid replied in the following terms:

> "The case first on the list will take the whole day of the court. I appear for the defendant in this case and the case should proceed to hearing now as I am duly instructed to proceed with case and have got all the relevant documents."

Mr. Oza replied that O. 9, r. 6 did not mention an advocate, but used the words "plaintiff" or "defendant", and therefore he submitted that the plaintiff was entitled to judgment. The issue then was quite clearly whether the defendant, not having presented himself, had made a sufficient appearance through his advocate. The learned magistrate gave a short ruling which was in the following terms:

> "Order 17, rule 2, and Order 9, rule 6 (1) (*a*) (ii) (B) of the Civil Procedure Code 1966 use the words 'parties' and 'plaintiff' and 'defendant' respectively. It never says that an advocate appearing for any of the parties himself becomes a party to the suit or the plaintiff or defendant as the case may be. This summons issued and served in this case on the defendant was summons for Disposal of suit. The defendant is absent today when the case is fixed for hearing.
>
> The plaintiff is therefore entitled for judgment under Order 9, rule 6 (1) (*a*) (ii) (B) of the Civil Procedure Code."

Against this order, the defendant/appellant now appeals and the main point argued on his behalf was that although the learned magistrate had noted Mr. Reid's presence in court, he decided that that was not sufficient appearance, in contravention by the provisions of O. 3, r. 1 and O. 5, r. 5. It was said that if the learned magistrate had required the defendant's presence in person, he should have so ordered or adjourned the case for that purpose. There was no doubt that Mr. Reid had been duly instructed and consequently there had been a lawful appearance, debarring the learned magistrate from dismissing the suit at that stage, but, of course, without prejudice to considering the effect of the defendant's personal absence at a later stage. In support of his submissions Mr. Reid referred me to the decision in *Khedu Naek and Others v. Rajib Ray* (1927), A.I.R. Patna 291.

Before I deal with the opposing arguments, it will be convenient to consider the various rules of the Civil Procedure Code already referred to. Order 17, r. 2, provides as follows:

> "Where, on any day to which the hearing of the suit is adjourned, the

> parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 9, or make such other order as it thinks fit."

This provision was relevant, not least in that on November 16, 1967, the case had come on for hearing but that by agreement between the parties, and having in mind the court's other commitments, the trial was adjourned to November 17, 1967, for the fixing of a further hearing date. On that day the trial was set down for February 29, 1968. Then O. 9 makes provision for the appearance of the parties and the consequence of non-appearance. Rule 1 of O. 9 provides as follows:

> "When a summons to appear has been issued on the day fixed in the summons for the defendant to appear or where a summons to file defence has been issued and a day for the hearing is fixed in accordance with the provisions of rule 15 of Order VIII, on the day so fixed for hearing, the parties shall be in attendance at the court-house in person or by their respective recognized agents or advocates, and the suit shall then be heard unless the hearing is adjourned to a further day fixed by the court."

It will be noticed that the parties may be in attendance in person or by their respective recognized agents or advocates. Then r. 6 recites as follows:

> "(1) Where the plaintiff appears and the defendant does not appear when the suit is called for hearing then –
>
> (*a*) [(i) — not relevant.]
>
> (ii) if the suit is before any court other than the High Court –
>
> (A) where the summons issued was a summons to file defence and it is proved that the summons was duly served, the court may proceed ex-parte;
>
> (B) the summons issued was a summons to appear and it is proved that the summons was duly served, the court may enter judgment for the plaintiff."

The summons issued in this case was for the disposal of the suit. It was served and as we have seen the defendant had been permitted to file his written statement. The argument accepted by the learned magistrate was that the use of the words "plaintiff" and "defendant" in the rule meant that the parties were obliged to be present in person. Therefore as O. 17, r. 2 referred to the failure of one of the parties to appear, and as the rule referred to the provisions of O. 9, consequently taking both provisions together, it was necessary for the defendant to appear in person at the adjourned date of the hearing.

On the other hand, the argument now advanced is that the words "parties" "plaintiff" and "defendant" in these provisions must be taken to mean that the parties could be present in person or represented by their recognized agents or advocates, and reliance was placed on O. 3, r. 1, which is as follows:

> "Any appearance, application or act in or to any court, required or authorized by law to be made or done by a party in such court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person or by his recognized agent or by an advocate duly appointed to act on his behalf:
>
> Provided that any such appearance shall, if the court so directs, be made by the party in person."

This general provision was not debarred in operation, as far as I can see, by any specific order of the court requiring the defendant's personal attendance.

I am told that he holds the post of a bank manager in Kigoma, and it appears that some grievance was felt because the learned magistrate did not inquire as to the whereabouts of the defendant. It was suggested that had the learned magistrate known this, he might have taken a more tolerant view. But the question remains whether the defendant had put in a lawful appearance, and as far as this rule is concerned there is no doubt that Mr. Reid was duly instructed to act on the defendant's behalf.

Then it was pointed out that under O. 5, r. 5, save where the court requires the personal appearance of the defendant, a defendant in respect of whom a summons to appear is issued, may appear (*a*) in person; or (*b*) by an advocate duly instructed and able to answer all material questions relating to the suit. It is clear from the record that Mr. Reid had intimated that he was duly instructed to proceed with the case and had got all relevant documents. Unless the learned magistrate considered that Mr. Reid was not able to answer all material questions relating to the suit, the defendant had made an appearance through his advocate. The authority cited, to which reference was made above, states plainly that "it is well settled that, if a pleader engaged by a party be actually present in court even though the party himself may not be present, so long as the pleader is competent to cross-examine the plaintiff, and adduce evidence on behalf of the absent defendant, there is no justification for passing an ex-parte decree because of the defendant's personal absence". There are, of course, occasions when an advocate is merely present in order to ask for an adjournment, without further instructions, where it may be that there is no lawful appearance; but those considerations do not arise in this case, because Mr. Reid did not ask for an adjournment, nor did he intimate that he had no instructions. From the record it is plain that the defendant wished the trial to proceed, and therefore as far as O. 3 and O. 5 are concerned, there was a lawful appearance through the defendant's advocate.

The next question then is whether the terms of O. 3 and O. 5 are relevant to the words used in O. 9 and O. 17. I have little doubt that they are. As we have seen, O. 9, r. 1 permits the appearance of the defendant either in person or by his advocate. I see no reason to think that O. 9, r. 6 must be read in a literal sense, meaning that the defendant must appear in person; having in mind the terms of r. 1, I should further say that O. 3 may also be prayed in aid in showing that a "defendant" includes his advocate, and having in mind the terms of O. 5, r. 5, the advocate must be one who is duly instructed, and able to answer all material questions. Support for this view will be found in the judgment in *The Land Officer v. Abdulrasul Jivraj* (1921–1952), 1 T.L.R. (R.) 410 at p. 420, where the learned judge commented as follows:

> "I propose to follow this decision of the Bombay High Court in the matter now before me, chiefly because no authority has been cited to me to show that the provisions of O. 3, r. 1 & 2, have no application to O. 9, r. 1 & 8, and cannot be taken into consideration when determining whether there has or has not been an 'appearance' by a party within the meaning of these rules.
>
> The test must be, did Mr. Stubbings intend to appear for the plaintiff when the suit was called for hearing before the lower court, and did he in fact appear as a recognized agent by virtue of the provisions of O. 3, r. 1 & 2?
>
> I answer both these questions in the affirmative and I find that when the suit was called for hearing there was an appearance on behalf of the plaintiff within the meaning of O. 9, r. 1 & 8, and that therefore the suit should not have been dismissed under the latter rule."

Now, of course, the case just referred to is not entirely on all fours with the

instant case, but the principle applies as much to the case of a plaintiff as to a defendant, and also to a case of a recognized agent and an advocate. I must further observe that the terms of O. 3 and O. 9 of the old Code are the same as those in the new Code.

It follows therefore that there was a lawful appearance in the instant case, and that judgment should not have been given for the plaintiff for the reasons, and at the stage, that the learned magistrate so ordered.

But learned counsel for the plaintiff/respondent argued that on a proper construction of the pleadings, the learned magistrate would have been bound to hold that the burden of proof rested upon the defendant and that therefore the defendant's presence in person was necessary. Consequently, although there might have been a lawful appearance as such through the defendant's advocate, the learned magistrate had come to the right conclusion in holding that judgment must be given for the plaintiff in the absence of the defendant himself. Criticism was levelled at paragraph 3 of the written statement of defence which, it was submitted, would in any event have had to be struck out as being an embarrassing pleading. As far as paragraph 2 is concerned, the burden of proof rested upon the defendant. Concerning paragraph 4, it was admitted that the burden of proof might have resided upon the plaintiff, while paragraph 5 was a strange allegation unsupported by a counter-claim. According to the defendant/appellant, however, he would have taken the step of abandoning the claims in paragraphs 2 and 3 of the defence, which would have had the effect of throwing the burden of proof in paragraphs 4 and 5 of the defence on to the plaintiff. Consequently, the defendant's presence would not have been necessary. As far as a counter-claim is concerned, it was contended that the defendant was not bound to put in a counter-claim, since he could have achieved his object by having the question of liability decided, and then, if necessary, bring a further suit later.

In dealing with this aspect of the arguments, I should recall that no issues had been framed on the pleadings. Had that been done and the burden of proof decided, it is possible that the arguments for the plaintiff/respondent might have proved justified. On the other hand, it might have turned out that the defendant's instructions had been such as to require the plaintiff to prove his case on the issues where the burden of proof fell upon him. Having considered the matter, I am of the opinion that I should not prejudge the position as to the determination of the issues and burden of proof. No doubt it is another of those remarkable cases where counsel for the defendant was prepared to embark on a trial relying on procedural tactics and a few documents in his possession. But whatever the merits may turn out to be, this appeal only concerns the question whether there had been a lawful appearance, and whether the learned magistrate had correctly construed the provisions of the Civil Procedure Code upon which he relied. As I see it, it is only those questions which I am called upon to answer, which I may say are not devoid of some importance in themselves as a matter of general principle. The answer is, as I have already indicated, that there was a lawful appearance and that judgment should not have been given for the plaintiff at that stage.

Accordingly the appeal is allowed, the judgment and decree of the lower court being set aside, and the record will be remitted to the lower court for the trial to proceed on such date as will be convenient to the court and the parties.

It remains to consider the costs. It was submitted by the plaintiff/respondent that the costs of this appeal should be costs in the cause. It seems to me that learned counsel for the respondent has striven nobly to defend an untenable position taken by Mr. Oza at the trial. But taking all the circumstances into

account, I cannot see any cause for depriving the appellant of his costs. Accordingly costs of the appeal will be appellant/defendant's costs in any event.

Appeal allowed.

For the appellant:
A Reid
Reid & Edmonds, Moshi

For the respondent:
V Dev Vohora
V Dev Vohora, Arusha

Re Air Safaris (Tim Air) Ltd
[1969] 1 EA 593 (HCT)

Division:	High Court of Tanzania at Arusha
Date of judgment:	3 October 1968
Case Number:	4/1965 (98/69)
Before:	Platt J
Sourced by:	LawAfrica

[1] Company – Capital – Loans paid into capital account – Capital structure of company not altered thereby.

[2] Company – Loan – Member or director loaning money to company – Treated as ordinary debt of company in winding-up.

[3] Company – Winding-up – Accounts not properly kept – Whether creditors misled – Whether loans by members to be deferred.

[4] Company – Winding-up – Loans by members to company – Whether barred by Companies Ordinance (Cap. 212*), s.* 158 (*T.*).

Editor's Summary

The petitioner, who was a shareholder and a permanent director of a private company incorporated in Tanzania on June 7, 1963, advanced free of interest and without security considerable sums of money to the company. No accounts were drawn up until August 23, 1965, which was after the presentation of a winding-up petition but shortly before the making of the winding-up order. In the accounts no special loan account was shown and all the money advanced was put into one capital account. The company

operated at a loss and it was the petitioner in this case who petitioned, as a creditor, for the compulsory winding-up of the company. The liquidator rejected the petitioner's claim, treating it as a debt due to her in her capacity as a member of the company (s. 158), and because the failure to file accounts was unfair to other creditors. The liquidator made an application to the court for approval of his action and the petitioner herself challenged the rejection of her claim. Both applications were heard together.

Held –

(i) directors and members of a company may loan money to a company, if it has power to borrow, and there is no reason in principle why they should not be considered as ordinary creditors;

(ii) Companies Ordinance (Cap. 212), s. 158 (1) (*g*) only covers debts due to a member by way of dividends, profits and something analogous to dividends and profits arising out of the member holding shares, and does not deal with debts due on extraneous contracts;

(iii) although the loans and payment for shares were credited to one capital account, the share capital was not increased nor was there any alteration in the capital structure of the company, so that the loans did not cease to be loans;

(iv) the petitioner could not be said to have a stake in the capital of the company in excess of the amount of authorised capital;

(v) the late filing of the accounts did not in this case make much difference to the other creditor.

Petitioner's claim admitted to proof; costs payable out of the estate of the company.

Cases referred to in judgment:

(1) *Re Jackson and Bassford Ltd*. (1906), 2 Ch. 467.

(2) *Re Lloyd's Furniture Palace Ltd*., [1925] Ch. 853.

(3) *Re Dale and Plant Ltd*. (1890), 43 Ch. D. 255.

Judgment

Platt J: These applications arise out of a creditor's claim put forward to the liquidator during the winding-up of Air Safaris (Tim Air) Ltd. The liquidator had hesitated over admitting the claim of the Hon. Mrs. Anthony Berry, who was the petitioning creditor for the winding-up of the company. Eventually her claim was rejected, but the liquidator sought the court's approval for his action. The creditor herself challenged the rejection by her application. It was agreed that both applications should be heard together.

The facts can be largely gleaned from the liquidator's statement of facts. The company was incorporated in Tanzania on June 7, 1963, with an authorised share capital of Shs. 100,000/- divided into 5,000 shares of Shs. 20/- each. Mrs. Berry was elected as a permanent director under the articles, and remained as such at all material times. In October, 1963, at a meeting of the Directors, it was approved that Mrs. Berry should be issued 51 shares at a nominal value at Shs. 20/- and Shs. 1020/- was debited to her account against advances of cash already made for the purchase of company assets. At the same meeting, at which Mrs. Berry presided, it was agreed that she would transfer funds from London to the extent of £7,000, for the purchase of two aircraft. It appears that by April 30, 1965, she was credited with a sum of Shs. 149,785/53 paid under her personal guarantee to the company's bank in liquidation of the indebtedness of the company. Between May, 1963, and August 27, 1965, the company suffered a loss during this period of operation of Shs. 258,158/14, although it is claimed that Mrs. Berry had gone on putting money into the company to an amount of Shs. 705,000/75. When the liquidator came to collect the assets, he raised Shs. 67,592/25, while the claims of the unsecured creditors amounted to Shs. 116,392/27.

There is no dispute about the technicalities of putting in a claim. What is said is that no proper balance sheet was drawn up while the company operated, until that of August 23, 1965. The winding-up petition was presented on May 22, 1965, and the winding-up order was made on August 25, 1965. It is said that there was no special loan account and that all monies advanced went into one capital account. As a result it was submitted that Mrs. Berry must be deferred to other unsecured creditors by virtue of s. 158 (1) (*g*) of the Companies Ordinance (Cap. 212). Her position, it was said, was that of a member liable to contribute and that sums of money owing to her as a member must be deferred. Her position as a member followed because Mrs. Berry had not classified herself in the company's books in any other way. There was also a second leg of the argument to which I will refer later. I am advised by both counsel that there is no authority on the exact points to be decided.

I shall begin with the fundamental principle that a director or a member may loan money to the

company; so long, of course, as the company had power to borrow money. In the present case, article 36 gave the directors powers to raise

or borrow money without limit for the purposes of the company's business and to secure repayment by a mortgage or charge on the property or assets of the company. It is agreed that Mrs. Berry did not take any security for her alleged loans. When a security for property has been given, the director or member can prove the debt in a winding-up. Trouble sometimes arises when the security leads to a fraudulent preference – see *Re Jackson and Bassford Ltd*., [1906] 2 Ch. 467 and cf. *Re Lloyds Furniture Palace Ltd*., [1925] Ch. 853. But in this case no question of preference over the unsecured creditors arises, since Mrs. Berry sought to prove her debt as one of them. If then a director is under no disability as to lending money to the company, there cannot be in principle any reason why he should be considered to be any other than an ordinary creditor or secured creditor if he has obtained a lawful security.

That brings me to the question as to how s. 158 (1) (*g*) should be construed. It recites as follows:

> "(1) In the event of a company being wound up, every present and past member shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts, and liabilities, and the costs, charges and expenses of the winding-up, and for the adjustment of the rights of the contributories among themselves, subject to the provisions of subsection (2) of this section and the following qualifications –
>
> (*g*) a sum due to any member of a company in his character of a member, by way of dividends, profits or otherwise, shall not be deemed to be a debt of the company, payable to that member in a case of competition between himself and any other creditor not a member of the company, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories."

Subsection (2) referred to is not applicable as Mrs. Berry did not have unlimited liability (see s. 4 of the Memorandum of Association). The question is whether Mrs. Berry advanced monies to the company in her capacity as a member or in a private capacity as any other creditor.

It seems to me that "sums due" in the section only refer to those "by way of dividends, profits or otherwise", and that those words must be understood in the light of the decision of *Re Dale and Plant Ltd*. (1890), 43 Ch. D. 255. This case was followed in a number of succeeding cases. Kay, J., observed as follows at p. 259:

> "That provision is this: 'no sum due to any member of the company in his character of member' – I omit the intervening words-'shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company'. What does 'character of member' mean? The intervening words seem to me to show that clearly. The words are: – 'by way of dividends' – that is on his shares – 'profits' – that again is in respect of his shares – 'or otherwise'. The words 'or otherwise' must mean something analogous to dividends or profits on his shares. That shows the meaning. Dividends are due to him in his character of member: there may be something else equally due to him in his character of member which this clause was intended to include. To my mind it is clear that the clause does not include money due for goods which a member has supplied to the company; otherwise it would be so expressed. Nor can it include payment for particular work which he has special skill in doing, and which he has done for the company. I am of opinion that this money which ought to have been paid to this claimant solely as managing director is money for which he may prove in competition with other creditors."

With respect I think that this passage makes the section quite clear. It covers debts due to a member by way of dividends, profits and something analogous to dividends and profits arising out of the member holding shares, and does not deal with debts due on extraneous contracts. If a debt due for goods delivered is not covered, nor a debt for services rendered, how can it cover a debt due on a loan of money? Moreover, as we have seen, loans may be proved in winding-up. If then Mrs. Berry made genuine loans, they are not caught by s. 158 (1) (*g*) of the Ordinance; which I need hardly add, is in identical terms with the provision construed by Kay, J.

The next question is whether Mrs. Berry did make the payments as loans. As far as I can understand the liquidator's argument, it is not disputed that the sums of money claimed passed to the company. What seems to be suggested is that as there was only one capital account, this money must be considered as advance towards capital. It was stressed that there was no loan account. In no way in the books has this money been classified as a special loan from Mrs. Berry. It appears that a distinction is possibly drawn concerning the first £7,000 paid by Mrs. Berry, which was credited to her account, whilst other loans now claimed were not. But the answer to that is that whilst the company's accounts were no doubt in disorder – I should say here that Mrs. Berry not being a resident apparently relied on others to see that the accounts were drawn up – there was no increase in the share capital. As far as the register is concerned, Mrs. Berry has 51 shares. The capital cannot be increased until the increase is permitted by the registrar. There has been no alteration in the capital structure of the company, and therefore the limit of the liability of Mrs. Berry as a contributory is the amount, if any, unpaid on her shares. These propositions put forward by learned counsel for Mrs. Berry seem to me to be incontrovertible and to follow from s. 158 (1) (*d*):

> "In the case of a company limited by shares no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member."

But the liquidator appears to argue that though there was no alteration in the capital share structure of the company, these sums were obviously intended to be capital payments; otherwise they would not have been entered into the capital account. It may be that in one sense the payments were capital payments. It is possible that the liquidator has in mind that these sums became something in the nature of circulating capital. It is not clear to me (possibly even to the liquidator who has had the onerous duty of trying to piece the company's affairs together) exactly how these sums "loaned" were used. But assuming that they were used towards acquiring only capital assets, do they become any the less loans to the company, made by a director in his or her personal capacity? In a general sense they represent the lender's investment in the company – what Mrs. Berry has contributed to build up the company. But in my opinion that does not alter her position with regard to her share in the capital structure of the company. Could she, for instance, claim a dividend on these loans? Of course she could not. Learned counsel's question is pertinent – does the liquidator intend to consider that Mrs. Berry had a stake in the capital of the company to the extent of £35,000, when the authorised capital is merely £5,000? The answer is that the liquidator could not do so. I come to this conclusion, then, that though the "loans" were put into the "capital account", whatever that may exactly mean in this case, they were not made a part of the capital structure of the company and did not therefore cease to hold their identity as loans. There is no resolution, as I understand it, that the company would consider them as against further shares to be allotted to Mrs. Berry, or that the capital would be increased for that purpose.

I next inquire whether there were any other aspects of the case which debarred these payments from being considered as loans. The company appears to have received the money to use as it liked. They were appropriated to what has been called the capital account. There is no indication what interest was to be paid. But it would be quite proper for the loans to have been made without interest if Mrs. Berry felt so inclined; no doubt she hoped that the company would eventually repay the sums. The facts presented to me suggest that it was Mrs. Berry's habit to make advances and loans to the company. She had done so with regard to the first £7,000. She brought the petition as a creditor, claiming that she had not been paid some £35,000. I do not see any evidence to suggest that the sums advanced were other than loans. If that is so, then to summarise: (*a*) Mrs. Berry was legally allowed to make loans to the company and she did in fact; (*b*) such loans were not transactions within the terms of s. 158 (1) (*g*) causing her to be deferred to other creditors with whom she now finds herself in competition.

The second argument addressed to me by the liquidator was that this procedure was unfair to the other creditors. They had given credit not knowing the real position of the company, and they were now to find that their share of the remaining assets would be swallowed up by Mrs. Berry's claim. The suggestion is that there was something underhanded in Mrs. Berry's loaning the company money, especially so as no proper accounts were drawn up. It is certainly unfortunate, not to say improper, that the accounts were not drawn up. I should, however, say that as the company was in ostensible existence from June 7, 1963, until the date of the petition, namely May 22, 1965, as far as the creditors were concerned, and certainly no later than August, 1965, when the winding-up order was made, they could have had only one set of accounts in any event. It is to be doubted whether the situation concerning the accounts did, in fact, affect any of the creditors. Had they gone to the registry, they would have found that no accounts had been filed. What were they to think? Presumably this was at best a dilatory company and at worst not one doing good business. They must nevertheless have continued to trade, if they had this knowledge; and if they did not, they cannot complain. What would their position have been had they known that Mrs. Berry was financially backing the company without security? Quite possibly as much gratified as suspicious. I doubt therefore whether the lack of accounts or knowledge of Mrs. Berry's position could have made much difference. If it is suggested that this was a case of fraudulent trading – keeping the company going when it was clear that the company could not pay its debts – the liquidator had to prove actual dishonesty. I see no evidence of that. The company seems to have been wound up promptly enough. There has been no preference as such. Nor do I see any grounds upon which the liquidator could attack Mrs. Berry for misfeasance. The picture which springs to my mind is that Mrs. Berry must have done her best to keep the company going through its formative stage by injections of money, a considerable part of which she must now lose. I cannot see, on what I am told, that she had made or will make any gain, let alone improper gain.

In my judgment, therefore, the liquidator was wrong not to admit Mrs. Berry's claim. I allow the application and vary the liquidator's decision accordingly by admitting her claim to proof. Mrs. Berry will have the costs of her application which shall be taxed. There will be one set of costs to be taxed. In as much as the company was partly to blame for the confusion caused by the state of its accounts, the costs will be paid out of the estate.

Order accordingly.

For the petitioner:
V Dev Vohora

V Dev Vohora, Arusha

For the liquidator:
A Reid
Reid & Edmonds, Moshi

Mita v Republic
[1969] 1 EA 598 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	25 April 1969
Case Number:	415/1969 (99/69)
Before:	Madan J
Sourced by:	LawAfrica

[1] Criminal Practice and Procedure – Sentence – Fine or imprisonment – Imposition of fine to be preferred irrespective of accused's earning capacity – Sentence of imprisonment on first offender for causing bodily harm reduced to fine.

Editor's Summary

The appellant, an air-hostess, bit the complainant on the chin. She pleaded guilty to causing actual bodily harm. The magistrate sentenced her to two months imprisonment, although she was a first offender and was contrite. In doing so he commented that he did not think a fine would serve any purpose as the appellant appeared to be earning a lot of money. On appeal against sentence:

Held –

(i) irrespective of an accused person's earning capacity it is not wrong to impose a fine unless the circumstances of the case irresistibly preclude this mode of punishment;

(ii) in the circumstances the sentence was excessive.

Sentence of imprisonment set aside.

Fine of Shs. 400/- or two months in default substituted.

No cases referred to in judgment

Judgment

Madan J: Since time began woman has had the three weapons of beauty, scratching nails and biting teeth in her armoury. To these she has added stiletto heels and pointed toes in modern times. In this instance the appellant, an air hostess, used her teeth to bite the complainant on the chin which led to a

charge against her of causing actual bodily harm contrary to s. 251 of the Penal Code. The appellant pleaded guilty to the charge and on April 17 she was sentenced to two months imprisonment. This appeal is against sentence.

Before passing sentence the learned magistrate pointed out that the appellant was a first offender, she appeared sorry and repentant. He added that this was, however, a very violent and unattractive act, although the appellant may have been provoked by the attempt to expel her from the premises.

The learned magistrate also said that the act of biting a man's face so that it required stitching is hardly justifiable. So he felt the accused must serve as an example to discourage this type of behaviour of which there was currently a lot.

The learned magistrate ended up by saying he did not think a fine would serve any purpose as the appellant appeared to be earning a lot of money.

I too try to keep abreast of events, incidents, developments. I am not aware that currently a lot of women have been biting a lot of men. There is no such sickness in Kenya. It may be there is a great increase in mouth-to-mouth contact and also in necking but that provides pleasant interludes. Be that as it may.

With respect I think the learned magistrate did not assign enough emphasis

to the appellant's contrite condition and the fact that she was a first offender. In this court also the appellant has apologised for the incident which, be it noted, happened suddenly during the course of a scuffle when she must have been suffering not only provocation, which the learned magistrate accepted but in my opinion failed to give it due weight, but also from the indignity being inflicted upon her by three men who were pushing her out, an act which has been described as eviction of the appellant from the premises, an act which has inherent in it the element of force.

I am also of the opinion that the learned magistrate misdirected himself when he said the act of biting a man's face is hardly justifiable. At no stage has the appellant tried to justify her act. What she did, as she was and is entitled, is to relate the provoking circumstances which led to a sudden commission of the act by her.

It seems the learned magistrate considered the idea of imposing a fine but decided against it for the reason I have already set out. I think irrespective of an accused person's earning capacity it is not wrong to impose a fine unless the circumstances of the case irresistibly preclude this mode of punishment which is not the case here. Surely the contrary cannot be correct; otherwise every well-paid accused person, irrespective of the nature of the offence, would be sent to prison by the courts without the option of a fine.

The appellant is usefully employed in a job which is economically beneficial to the country. She is a young person, only 21 years of age. She has been in prison for a week already. I think the interests of justice will be met if I set aside the sentence of imprisonment and substitute therefore a fine of Shs. 400/-; in default two months imprisonment.

Order accordingly.

For the appellant:
AR Kapila
AR Kapila & Co, Nairobi

For the respondent:
S Sangale (State Counsel, Kenya)
Attorney-General, Kenya

Jesani v Republic
[1969] 1 EA 600 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 2 April 1969

Case Number: 1411/1968 (100/69)

Before: Mwendwa CJ

Sourced by: LawAfrica

[1] Traffic – Careless driving – Whether mere fact of collision sufficient to support a conviction – Effect of allegation by prosecution of excessive speed of which there was no evidence – Traffic Act (*Cap.* 103), *s.* 49 (1) (*K.*).

Editor's Summary

The appellant was convicted of driving a vehicle without due care and attention under s. 49 (1) of the Traffic Act and fined. The evidence was that the appellant's vehicle hit a cyclist's right handle bar while going the same way as the cyclist. The collision occurred on a bend with a continuous white line down the centre of the road. The vehicle stopped twenty feet from the point of impact; the cycle ended up six feet off the edge of the tarmac. The cyclist gave evidence that while he was riding his bicycle one foot from the edge of the tarmac, he was struck from behind and became unconscious. The prosecution at the opening of the case contended that the appellant drove at a very high speed and as a result could not control his vehicle and hit the cyclist. There was no evidence of excessive speed, but the magistrate ruled there was a case to answer because the accident occurred where there was a continuous white line. In his formal statement to the court the appellant said: "I saw a bus coming from Kiambu side. The bus crossed the white line and came on my side of the road of the white line. Eventually I swerved my vehicle to the left side to avoid head on collision and within the process I touched the cyclist who fell down. If the bus did not cross the white line no accident could have occurred. The bus was very fast." In convicting, the magistrate said he disbelieved the defence on the point that the bus crossed the white line. On appeal:

Held –

(i) there was no evidence to contradict the appellant's evidence that the bus crossed the white line, and the appellant's evidence should have been accepted;

(ii) there was no evidence to support the prosecution's contention that the vehicle was being driven at an excessive speed, the only fact of negligence alleged by the prosecution (*Image v. R.* (1) applied);

(iii) a conviction may not be based merely on the fact of a collision (*R. v. Wallace* (2) followed).

Appeal allowed – conviction and fine set aside.

Cases referred to in judgment:

(1) *Image v. R.*, [1957] E.A. 94.

(2) *R. v. Wallace*, [1958] E.A. 582.

Judgment

April 2 1969 The following reasons for the judgment of the court were read by **Mwendwa CJ:** The appellant was convicted by the magistrate on one charge of driving a motor vehicle without due care and attention contrary to s. 49 (1) of the Traffic Act (Cap. 403, Laws of Kenya) and sentenced to pay a fine of Shs. 400/-. He appeals against his conviction. State Counsel did not

support the conviction and we allowed the appeal, quashed the conviction and set aside the fine. We reserved our reasons for so doing which we now give.

The evidence was that the appellant was driving his car at about 4.30 p.m. on August 5, 1968, on the Kiambu-Nairobi road towards Kiambu, when he came into collision with a cyclist who was travelling in the same direction. At the place of the accident the road was slightly uphill and approaching a left-hand bend and there was a continuous white line. At the trial, in opening the case for the prosecution, the prosecuting officer said that it was alleged that the appellant drove at a very high speed and as a result could not control his vehicle and hit the cyclist. The evidence of the cyclist was that he was riding his bicycle on the tarmac, about one foot from the edge when he was struck from behind. He became unconscious and did not know what had hit him. The evidence of P.C. Francis Ndei, who visited the scene of the accident, was that he found the cycle, which had been hit on the right handle bar, on the grass about six feet from the edge of the tarmac and the appellant's vehicle about twenty feet from the point of impact. The appellant was there and told P.C. Ndei that he "was trying to overtake the cycle and immediately he saw a bus coming from the opposite direction and he then immediately swerved to the left and hit the cyclist". The appellant's statement to the police was put in evidence and in it he said: "As I was trying to overtake the cyclist I found that the bus was very close to me and I swerved my vehicle to my nearside and I hit the cyclist." The prosecution having closed its case, Mr. Zool Nimji, who appeared for the appellant, submitted that there was no case for the appellant to answer contending that the prosecution's case was that the accident resulted from excessive speed and there was no evidence of that, or of any other form of negligent driving, the only evidence being that the accident had occurred. In his ruling the magistrate observed that he had no doubt that the prosecutor had not studied his file properly and was not sure which act or omission was alleged to support the charge against the appellant; that from the evidence it was clear that the collision took place at a point on the road where there was a continuous white line; that a driver is expected to take special care at such a place and the appellant appeared not to have exercised reasonable care. The magistrate then found that there was a case for the appellant to answer. The appellant gave evidence on oath in which he said:

> "I saw a bus coming from Kiambu side. The bus crossed the white line and came on my side of the road of the white lines. Eventually I swerved my vehicle to the left side to avoid head on collision and within the process I touched the cyclist who fell down. If the bus did not cross the white lines no accident could have occurred. The bus was very fast."

In his judgment the magistrate referring to the appellant's evidence said:

> "I disbelieved the defence that an oncoming bus crossed the white continuous line and made the accused swerve his vehicle to the left thereby hitting the cyclist by the side of his vehicle."

Mr. Zool Nimji referred to the ten grounds of appeal and said that they could be grouped into two, first that the proceedings were unfair and secondly that there was no evidence to support the conviction. Mr. Nagpal, who appeared for the State, conceded that the case for the prosecution rested on an allegation of excessive speed and there was no evidence supporting that and that, there being no direct evidence that the bus did not cross the white line, the appellant's evidence that it did should have been accepted, and he did not support the conviction.

A ground of appeal that the proceedings were unfair is too wide. Mr. Zool Nimji, however, does specify by referring to the grounds of appeal and the

particulars are: the case for the prosecution being excessive speed, the defence was prepared to meet that allegation and, there being no evidence of excessive speed appearing in the case for the prosecution, the appellant could not be convicted on an unspecified form of negligence, the magistrate having in his judgment merely stated that the appellant, when he decided to overtake the cyclist, failed to observe "the white dividing continuous line and the bent corner". We are referred to the case of *Image v. R.*, [1957] E.A. 94. In that case the appellant was charged with manslaughter and the act of negligence relied on by the prosecution was that he attempted to pass a lorry in the dust thrown up by the lorry. It was held that, from the direction to the jury, it was not possible to ascertain whether the verdict was arrived at on the basis of a deliberate attempt to pass the lorry or on the basis of driving dangerously close to it. There was evidence that the appellant was driving as much as eighty yards behind the lorry and there was also evidence that at the relevant time there was an unexpected spurt of dust which might have resulted in the appellant losing his sense of position on the road. The relevant point was that the case that the appellant had to meet was that he attempted to pass the lorry in the dust, and not that he was driving dangerously close to the lorry or whether or not he could expect a sudden spurt of dust. Considering these matters Briggs, J.A., at p. 95 said:

> "There remains the question whether the learned judge should have instructed the jury that they might convict on the basis of negligence by driving too close to the lorry. We do not wish to lay down any general rule that only those kinds of negligence expressly alleged by the prosecution may be put to a jury. The varieties of negligence and the circumstances in which they may arise are too numerous and too different to allow of such a generalization. But in this case the Crown had not merely confined itself to a single hypothesis as regards the facts constituting negligence; it had expressly rejected the alternative hypothesis which the learned judge invited the jury to consider. We think the practical effect of this was to divert the attention of the defence from this aspect of the case in such a way that the appellant was in effect induced not to attempt to defend himself against a conviction on that basis. We therefore think that it was unfair to him that the court should put the alternative hypothesis to the jury, at least without warning the defence that that aspect of the case must be considered."

In the case before us the element of unfairness was that there was no evidence of excessive speed and the appellant was never told before he closed his case, nor does it appear from the magistrate's judgment, what form of negligence he was alleged to have been guilty of.

Again a ground of appeal that there was no evidence to support the conviction is not sufficient, but Mr. Zool Nimji relies on the particulars that emerge from the grounds of appeal and it is that there being no evidence contradicting the appellant's evidence that a bus came over the brow of the hill, being driven partly over the white line, and the appellant swerved to miss hitting it and came into collision with the cyclist, and this evidence not being in conflict with any other evidence, it should have been accepted. We agree that, looking at the evidence as a whole, there were no grounds for rejecting the appellant's evidence but even if there were grounds for doing so it does not appear that the appellant was guilty of any act or omission which was negligent. In this case the magistrate found in his judgment that if the appellant had observed the bend and the presence of the white line no accident could have occurred and he was guilty. This was to base the conviction on the mere fact of the collision and this is not sufficient for the reason that there is no finding based on fact of an act or omission which was negligent. The position was admirably summed up by Law, J., in the case of *R. v. Wallace*, [1958] E.A. 582 where it was held that:

> "a conviction for driving without due care and attention cannot be founded on the mere fact of a collision, but must be based on a finding of fact that the driver charged with the offence was guilty of some act or omission which was negligent, and which was a departure from the standard of driving expected of a reasonably prudent driver."

In the case before us there was no evidence supporting the case for prosecution that the accident was caused by negligence resulting from excessive speed and there being no evidence that the appellant was guilty of any act or omission which was negligent, and which was a departure from the standard of driving expected of a reasonably prudent driver, we allowed the appeal.

Appeal allowed.

For the appellant:
Zool Nimji
Shapley Barret Marsh & Co, Nairobi

For the respondent:
OP Nagpal (Senior State Counsel, Kenya)
Attorney-General, Kenya

Katengele v Republic
[1969] 1 EA 603 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	13 June 1969
Case Number:	249/1969 (101/69)
Before:	Biron Ag CJ
Sourced by:	LawAfrica

[1] Criminal Law – Forgery – Blank cheque – Unlawful completion of cheques signed in blank – Penal Code (*Cap.* 16), *ss.* 333 *and* 335 (*c*) (*T.*).

[2] Criminal Law – Forgery – Discrepancy between cheque and its related counterfoil – Penal Code (*Cap.* 16), *ss.* 333 *and* 335 (*c*) (*T.*).

[3] Criminal Law – Theft – Theft of cash charged – Theft of cheques is theft of cash – Penal Code (*Cap.* 16), *s.* 271 (*T.*).

[4] Criminal Practice and Procedure – Charge – Theft of cheques charged as theft of cash – Charge good.

Editor's Summary

The appellant was the book-keeper of a hotel in Dar-es-Salaam. The General Manager and Manageress of the hotel, who were often away on business trips, left the appellant with a number of signed blank cheques. The appellant without authority made the cheques payable to himself and cashed them or had them credited to his bank account. He was convicted by the resident magistrate on charges of forgery and of uttering false documents; but he was acquitted on charges of stealing cash as a servant because the magistrate held that the money obtained belonged to the bank on whom the cheques were drawn and not to the hotel company. He appealed from conviction on the grounds that he was authorised by the General Manager and the Manageress to make out the cheques as part of a fraudulent arrangement to evade income tax. The Republic appealed against the acquittal. The two appeals were consolidated.

Held –

(i) it is forgery unlawfully to fill in the sum on a cheque signed in blank;

(ii) if a cheque is payable to one person and its related counterfoil shows that it is paid to another person, the cheque is a forgery in that it tells a lie about itself;

(iii) even if the appellant's allegation of a conspiracy were accepted it would not be a defence to the charges because the property stolen was not that of the parties to the alleged conspiracy, but that of the hotel company which employed them all;

(iv) under the Penal Code "money" includes "cheques" and it is permissible to look at that definition for the purpose of interpreting a charge under that statute of theft of a sum of money;

(v) although the charges of theft referred to the stealing of cash it was quite clear to the defendant from their form and nature that the charges related to the stealing of cheques, so that the charges as laid were sufficiently particularized (*Shiv Kumar Sofat v. R.* (11) distinguished).

Obiter: in allowing an appeal against acquittal by a Magistrates Court the High Court is not limited to the same maximum sentence which could have been imposed by the lower court.

Appeal against convictions dismissed. Appeal against acquittals allowed.

Cases referred to in judgment:

(1) *R. v. Milner Hart* (1836), 7 C. & P. 652; 173 E.R. 285.

(2) *R. v. Bateman* (1866), 4 F. & F. 1068; 176 E.R. 911.

(3) *R. v. Richardson* (1860), 2 F. & F. 343; 175 E.R. 1088.

(4) *Flower v. Shaw* (1848), 2 C. & K. 703; 175 E.R. 294.

(5) *R. v. Forbes* (1835), 7 C. & P. 224; 173 E.R. 99.

(6) *R. v. Hill* (1838), 8 C. & P. 274; 173 E.R. 492.

(7) *R. v. Cooke* (1838), 8 C. & P. 582; 173 E.R. 627.

(8) *Menzour Ahmed s/o Sheikh Soleh Mohamed v. R.*, [1957] E.A. 386.

(9) *Chandhubhai Kathibhai Patel v. R.* (Kenya Supreme Court Criminal Appeal No. 437 of 1955) (unreported).

(10) *D'Andrea v. Woods*, [1953] 2 All E.R. 1028.

(11) *Shiv Kumar Sofat v. R.*, [1957] E.A. 840.

(12) *R. v. West* (1948), 64 T.L.R. 241.

(13) *R. v. Davenport*, [1954] 1 All E.R. 602.

(14) *R. v. Keena*, 11 Cox C.C. 123.

(15) *R. v. Hampton*, 11 Cr. App. R. 117.

Judgment

Biron Ag CJ: Edward Mwaiswangwa Katengele, hereinafter referred to in this judgment as the appellant, was charged on 38 counts. Two of these counts were for forging and uttering a letter, on which he was acquitted. The other 36 consisted of twelve trilogies of offences of forgery, uttering and stealing the cash represented by twelve cheques. The appellant was convicted on all the counts of forging and

uttering, and acquitted on all the counts of stealing. The appellant is now appealing from his convictions, whilst the Republic is appealing from the acquittals, and their respective appeals have been consolidated. I ought to add, as this is the first case of the Republic appealing from an acquittal under the new legislation, the Criminal Procedure Code (Amendment) Act 1969, that I consider it perfectly proper in such cases as this instant one, where there is an appeal from convictions and a counter-appeal from an acquittal, to consolidate the two appeals, particularly so as no objection to their consolidation has been raised by either side.

It was established in evidence, not disputed, that the appellant, who at the material time was employed as book-keeper and, apparently, also in charge of the stores, at the Oyster Bay Hotel, owned by the Tanganyika Tourist Hotels (Cordura) Ltd., hereinafter referred to as the company, over a period from

August 5, 1967, to July, 1968, made out twelve cheques drawn on the company in amounts ranging from Shs. 1,016/- to Shs. 4,213/20. These cheques all bore the signatures of Mr. Henry Lockhurst, the General Manager of the company, and his wife, Mrs. Edith Lockhurst, the Manageress of the Oyster Bay Hotel, who were the only persons authorized to sign cheques. Although these cheques were all made out to the appellant as payee, their counterfoils, which with one exception, due apparently to an oversight, bore the same amount as their related cheques, showed as payees the names of sundry tradesmen who supplied the hotel with goods, and the hotel's books and accounts correspondingly showed these amounts as having been paid to the several tradesmen, whereas in fact none of the tradesmen ever received any of these monies, but all the cheques were either immediately deposited by the appellant into his own bank account or were cashed by him. The foregoing are the basic undisputed facts. What is in dispute is whether the appellant, as he contends, was authorized to so make out the cheques, and the destination of the monies, the proceeds from these cheques.

Both Mr. and Mrs. Lockhurst testified that, as they were often away for long periods at a time – they also managed the Mikumi Game Park Lodge – they would leave with the appellant signed blank cheques, and the twelve cheques, the subject-matter of the charges, were so left with the appellant, and he made them out as payable to himself, without either their authority or knowledge. And it is the prosecution's case that the appellant himself pocketed the proceeds from the cheques. The evidence of Mr. and Mrs. Lockhurst was supported by that of Mr. Godinho, the chief bookkeeper and accountant at the hotel, who, as remarked by the learned magistrate in his judgment, was actually being superseded in the hierarchy at the hotel by the appellant. He confirmed that Mr. and Mrs. Lockhurst were often away from the hotel for lengthy periods.

The appellant's case was that he was instructed by Mr. Godinho to make out these cheques payable to himself, but to enter on the counterfoils of the cheques, and also in the books of the company, the names of tradesmen, purporting to show that these sums had been paid to the tradesmen, whereas he was to cash the cheques himself, and the proceeds from these cheques would be divided between Mr. and Mrs. Lockhurst, Mr. Godinho and himself. This division of the proceeds of the cheques was, to use the appellant's own terminology which, incidentally, he repeated at the hearing of this appeal – he conducted his own case – "additional non-taxable salaries". According to him, the idea was that these four officials, all employees of the company, were to, and did, obtain increases in their salaries which were not subject to income tax, as the monies they received were shown in the company's books as having been paid out to sundry tradesmen for the supply of goods, thus accounted for as expenditure.

I propose to deal with the factual issues first. As noted, both Mr. and Mrs. Lockhurst stated that they left blank signed cheques with the appellant, and it was these cheques which the appellant filled in and made payable to himself, without their authority or knowledge. According to them, and to Mr. Godinho, it was only when, as a result of Mr. Lockhurst's discovering that there seemed to be undue losses in the running of the hotel, set in motion the investigation of the accounts, that it was discovered that the appellant had made out the cheques payable to himself and pocketed the proceeds. It should be noted, as remarked by the learned magistrate in his judgment, that the appellant's defence was never put to either Mr. or Mrs. Lockhurst when they were in the witness box. Therefore there was no express denial from either of them as to their participation in this scheme, put up in the appellant's defence. And even in the case of Mr. Godinho there was only a very oblique question in cross-examination as to income tax. From the whole tenor of the proceedings in the presentation of the

prosecution case, particularly the appellant's conduct of the cross-examination of the prosecution witnesses, this defence of a foursome scheme to give the four employees increases in salaries must have come as a surprise, if not as a shock, to the trial magistrate.

The issue before the court, however, was not purely one of credibility. The learned magistrate very carefully and painstakingly examined all the accounts, particularly the bank statements, and also those in respect of the appellant's bank account, and he noted and remarked that although in many cases these large sums, the proceeds from the cheques, were credited to the appellant's account immediately on or very soon after the cheques were deposited or cashed, no large withdrawals were made from his account, which should and would have been the case if the four employees of the company were to divide the proceeds of the cheques between them. Intrinsically, the learned magistrate found the appellant's defence very hard to believe. Apart from that, there was the overwhelming evidence adduced by the prosecution, which the learned magistrate found fully established, that the appellant made out the cheques payable to himself without any authority from, or connivance with, any other employee of the company; that he cashed these cheques and pocketed the proceeds, and falsely accounted for these monies in the books of the company as payments to tradesmen for goods supplied by them to the company.

The appellant's petition of appeal is prolix in the extreme and, as noted, he appeared in person at the hearing of the appeal, and it must be added that he conducted his case with considerable skill. Even so, having duly perused both his petition of appeal and having heard his arguments in great detail, nothing has been advanced which in any way reflects on the propriety of the learned magistrate's findings on the facts, which I consider are fully supported and justified by the evidence. I would go further and hold that, even if the appellant's defence is accepted that it was a case of a joint conspiracy between himself and the three other employees of the company, that would be no defence to the charges of forgery and uttering, as there would still be an intent to defraud, if not the company as well, which aspect will be dealt with hereinafter, at least the income tax authorities.

With regard to the law, the learned magistrate directed himself in his judgment, as he had done previously in a ruling on a submission of no case to answer by the appellant, at the close of the prosecution case, that although forgery is popularly defined as the making of a document which tells a lie about itself, whereas these cheques made out by the accused do not, apparently, tell a lie about themselves, yet such making still constitutes forgery. The learned magistrate relied on a passage in Archbold, 35th Edn., at paragraph 2149, the relevant part of which reads:

> "It is a forgery for a person, having authority to fill up a blank acceptance or a cheque for a certain sum, to fill up the bill or cheque for a larger sum (*R. v. Miner Hart*, 7 C. & P. 652; *R. v. Bateman*, 1 Cox 186; *R. v. Richardson*, 2 F. & F. 343); or to fill in the sum on a cheque signed in blank; *Flower v. Shaw*, 2 C. & K. 703. And it is forgery for a man to put the name of another on a bill of exchange without his authority, even if when he did so he expected to be able to meet the bill when due: *R. v. Forbes*, 7 C. & P. 224; *R. v. Hill*, 8 C. & P. 274; *R. v. Cooks*, 8 C. & P. 582."

I have duly looked up the authorities cited by Archbold, and they all support this statement of the law. Although, as remarked, this seems somewhat an extension of the offence of forgery as, on the surface at least, the cheques do not tell a lie about themselves, the authorities have been fully accepted in England and duly followed, and there is no reason why they should not be so followed in this country. Further, in this instant case, the making by the appellant of

the cheques would constitute forgery and better answer the definition that they tell a lie about themselves, in that each cheque which emanates from and relates to its relevant counterfoil, each bearing the same number, purports to state what is set out on its related counterfoil. As noted, all the related counterfoils show the payments as made to sundry tradesmen, whereas the cheques with which they are connected show the appellant as payee. They are all, thus, doubly forgeries. The learned magistrate was, therefore, perfectly correct in convicting the appellant on the forgery and uttering counts as charged. The appeal against these convictions is, therefore, formally dismissed.

To turn to the Republic's appeal from the acquittals, although the magistrate found that in actual fact the appellant unauthorisedly made out the cheques payable to himself, which he either cashed and pocketed the proceeds or deposited into his account at the bank, he nonetheless acquitted him on the counts of stealing, directing himself in his judgment, and I quote – it is necessary to quote in extenso:

> "Counts 5, 8, 11, 14, 17, 20, 23, 29, 26, 32, 35 and 38 are framed as allegations of stealing by servant the amounts shown on the cheques. What accused in fact did was to persuade the Masdo House Branch of N.B.C. to pay him cash or credit his account at Bank House Branch with the amounts shown on the forged cheques. The relationship of banker and customer on current account is one of debtor and creditor or borrower and lender. In fact, in this case, the company's bank account shows that the hotel is run on overdraft facilities. Even in the more normal case, it is not possible to state that the money paid out by a bank is the property of the customer. This is the more so where that customer in fact has no money deposited at the bank, but operates on permanent overdraft facilities. Accused certainly did not steal these sums of money from the bank by the false pretence that the cheques were genuine. Section 187 C.P.C. allows this court to convict an accused person of the crime of obtaining by false pretences where the evidence justifies such a course, even when the accused is in fact charged with stealing. However, an added difficulty in this case is raised by the fact that the person from whom accused is alleged to have stolen in the relevant counts is a different person from that which the evidence shows him to have obtained the same sums. I am aware of no authority which would allow not only the substitution of a conviction for false pretences on a charge of stealing, but also would allow the conviction for false pretences to relate to a different person from the charge of stealing. It is indeed a pity that this must be the result. On the evidence which I have heard, I am satisfied beyond all reasonable doubt that accused did obtain these sums from the bank by false pretences. Yet, even allowing for the provisions of section 187, I find myself unable to enter convictions for these offences. Had the charges alleged stealing from the bank, or had the evidence proved obtaining from accused's employers, I would have had no hesitation in applying the provisions of section 187. That is, however, not the case."

Although the magistrate has admirably directed himself, he has, however, overlooked the definition of money in the Penal Code, s. 5, that:

> " 'money' includes bank notes, currency notes, bank drafts, cheques and other orders, warrants or requests for the payment of money."

and also the leading case on the interpretation and application of the section, that of *Menzour Ahmed s/o Sheikh Soleh Mohamed v. R.*, [1957] E.A. 386. Although this is a Kenya case, the definition of money in our Code is the same as in the Kenya Code. The head-note to that case reads:

> "*Criminal law – Theft by agent – Cheque negotiated irregularly – Theft of*

money supported by theft of cheque – Penal Code, s. 5, *s.* 263 (1), (2) (*e*) *and* (3) *and* s. 278 (*c*) (*K.*) – *Advocates* (*Accounts*) *Regulations* 1952 (*K.*) – *Criminal Procedure Code, s.* 137 (*c*) (i) *and* (iv) *and s.* 137 (*f*) (*K.*).

The appellant, an advocate, had recovered a debt of Shs. 8,000/- on behalf of his client. The debtor had paid by giving two cheques payable to the appellant's order with an oral direction to the appellant that they or the money they represented be paid to the client. The appellant endorsed one cheque for Shs. 3,000/- and passed it on to his own garage company to reduce his indebtedness. He was charged before a resident magistrate on two counts of theft by an agent, and was convicted, but on appeal to the Supreme Court, the conviction on one count was quashed. The grounds of the second appeal were that what the appellant did was not theft under the Penal Code and that the charge as laid was not proved.

Held: (i) the cheque which the appellant received, although payable to his order, was received by him for and on account of his client, and he was not entitled to deal with it as his own property by using it for the purpose of reducing his indebtedness to the garage company; his intent was to use it at his own will within the meaning of s. 263 (2) (*e*) of the Penal Code, and he thus fraudulently converted it to his own use;

(ii) the words 'the sum of Shs. 3,000/-' used in the Particulars of Offence sufficiently described a valid cheque for that amount.

Appeal dismissed."

It is also not without interest to quote a passage from the judgment at page 390:

"It seems clear that in England proof that a cheque has been embezzled does not satisfy an allegation in an indictment that money has been embezzled. But in Kenya 'money' is defined in s. 5 of the Penal Code as including, amongst other things, cheques. There is no definition of money in the Larceny Act. The learned judges of the Supreme Court, following a previous decision of that Court in *Chandhubhai Kathibhai Patel v. R.* (5), Kenya Supreme Court Criminal Appeal No. 437 of 1955 (unreported), held that the description 'the sum of Shs. 3,000/-' was, by virtue of the definition of 'money' in s. 5 of the Penal Code, a sufficient description of 'a cheque for the sum of Shs. 3,000/-'. Their reasoning was briefly as follows: It is permissible to look at the definition of 'money' in the Penal Code for the purpose of interpreting a charge under that statute of theft of a sum of money. Although the word 'money' was not used in the charge, a 'sum of Shs. 3,000/-' is in fact money. The definition of 'money' could therefore be imported into the charge so as to make the words 'the sum of Shs. 3,000/-' embrace a cheque for the sum of Shs. 3,000/-. Accordingly, the words 'the sum of Shs. 3,000/-' sufficiently described a valid cheque for that amount. The learned judges gave full and comprehensive reasons for their conclusion. We agree with them that the case of *D' Andrea v. Woods* (10), [1953] All E.R. 1028, does by analogy support their view that the definition of 'money' in the Penal Code could be imported into the charge although the word itself was not contained therein. The appellant must be taken to have known this definition which is part of the law of Kenya. We think therefore that the first appellate court rightly concluded that the charge was proved as laid and the appeal on this point also must fail."

This case of *Menzour* was fully considered and distinguished in that of *Shiv Kumar Sofat v. R.*, [1957] E.A. 840, which has a striking resemblance to our case, and must accordingly be examined and considered in some detail. The headnote to that case reads:

"*Criminal law – Theft – Theft of cash charged – Whether theft of cheques is theft of cash.*

The appellant was convicted before the resident magistrate, Nairobi, on sixty-one counts each charging theft of cash by a person employed in the public service, contrary to the Penal Code, s. 275, and was sentenced on each count to five years imprisonment with hard labour, the sentences to run concurrently. In all instances, the appellant had either fraudulently obtained cheques or fraudulently arranged for cheques to be paid into his banking accounts, and the ground of his appeal was that the convictions were wrong in law in that the evidence did not support the offences charged.

Held (i) in those instances where the railway administration had directly paid cheques into the appellant's accounts, the money represented by them became the property of the bank, and although there was fraud on the part of the appellant and probably false pretences, there was no taking of the cheques, nor was there conversion of them for there was no actual receipt of money; accordingly, those convictions must be set aside.

(ii) in the remaining instances, the appellant had obtained the cheques but on none of these counts, with the exception of count 32, was it established that there had been theft of cash as distinct from theft of the cheques; and since a cheque had never been held to be cash within the meaning of the criminal law, these convictions also must be set aside.

(iii) the facts supporting count 32 were different in that the appellant, having obtained a cheque drawn in favour of a fictitious person, cashed it, keeping the money for himself, and in so doing was guilty of theft of the cash he received; the appellant was rightly convicted on that count and in the circumstances the sentence imposed was not excessive.

Order accordingly."

As in that case, where the appellant was charged with stealing, and I quote from the particulars of one of the charges, as set out in the judgment:

". . . cash of the value of Shs. 2,588/-, the property of Her Majesty",

Likewise in our case, the appellant on each of the stealing counts was charged with stealing:

". . . cash Shs. . . . /-, the property of his employers, which came into his possession by virtue of his employment."

As will be noted, in the *Menzour* case, the charge was laid as stealing 'a sum of Shs. 3,000/-'. In distinguishing the two cases, Rudd, C.J., in his judgment said, at page 842:

"So far as we are aware, a cheque has never been held to be cash within the meaning of the criminal law and in relation to a criminal charge. Cash is certainly money within the meaning of the Penal Code, and a cheque is also money by definition in the Penal Code, but it does not necessarily follow that the word 'cash' is the correct description of a cheque. In the recent case of *Menzour Ahmed s/o Sheikh Soleh Mohamed v. R.* (1) a conviction for theft of a sum of Shs. 3,000/- was upheld by this court and by the Court of Appeal ([1957] E.A. 386) where the evidence was that the appellant in that case had stolen a cheque for that amount by converting it to his own use without receiving cash or other money in exchange for it. The basis of that decision was that a cheque was money within the definition of that word in the Penal Code and the words 'a sum of Shs. 3,000/-' meant a sum of money and were capable of applying to a cheque for Shs. 3,000/-. Even so, the Court of Appeal said ([1957] E.A. at p. 390):

'In some cases, the description in a charge of a cheque for the sum of money might mislead the person charged in his defence If prejudice

> in fact resulted, a conviction on such a charge would no doubt be set aside on that ground. In the instant case, although the "money" which the appellant was charged with stealing would have been better described as a cheque for Shs. 3,000/-, it is admitted that the appellant was not in fact prejudiced by the form of the charge.'

We respectfully agree. The Court of Appeal also quoted from the judgment in *R. v. West* (1948), 64 T.L.R. 241 at p. 243:

> 'It is an essential feature of the criminal law that an accused person should be able to tell from the indictment the precise nature of the charge or charges against him, so as to be in a position to put forward his defence and to direct his evidence to meet them.'

There is, of course, a clear distinction in law between the theft or conversion of a cheque and the theft or conversion of its proceeds in cash. This distinction may be of importance. See *Davenport's* case, [1954] All E.R. 602; *R. v. Keena*, 11 Cox C.C. 123; and *R. v. Hampton* 11, Cr. App. R. 117.

The word 'cash' is not a very precise term. Originally, it was of eastern origin and meant 'small copper coins'. Later it came to mean 'currency in coin'. Still later, bank notes and treasury notes which passed as currency became included in its connotation. In certain circumstances, in connection with the construction of bequests, it has been given a wide connotation so as to include cheques, but such cases are not necessarily a sound guide for the wording of counts in criminal charges and indictments. It would seem, therefore, that its meaning in particular circumstances may be governed by the context in which it is used. Nevertheless, in our opinion, it is true to say that ordinarily and unless there are circumstances to show that a different meaning was intended, the word 'cash' refers to some sort of currency such as coins, treasury notes or bank notes of fixed ascertained value and that it does not ordinarily mean a cheque of the value of which may be uncertain or which can be stopped by the drawer. As a verb 'to cash a cheque' means to turn it into ready money or currency. We do not consider it to be an appropriate word to use in a criminal charge of theft where it is intended to allege a theft or conversion of a cheque and, in our opinion, it cannot be said that anyone reading the counts in this case would necessarily assume from their terms that it was intended to charge the appellant with stealing a cheque. The fact that cash is within the meaning of the word 'money' as defined in the Penal Code does not, in our opinion, justify the theft of a cheque being charged as a theft of cash. For this reason, we are of opinion that the convictions and sentences imposed in this case in respect of the counts, except count number 32, must be set aside."

The court then went on to consider count 32, where the appellant actually cashed the cheque, and after fully considering the particular facts and circumstances of that charge, upheld the conviction on that count.

It may, therefore, well be argued, by analogy with this case, that the appellant in our case could only be convicted of stealing the cash represented by the cheques, where he actually cashed the cheques, but not in the cases where he deposited the cheques into his own account at the bank. Apart from the fact that this Kenya case is not binding on this court, although of great persuasive authority, it can on the facts, I think, be distinguished from this instant case. In that case Rudd, C.J., in his judgment above quoted remarked:

> ". . . Nevertheless, in our opinion, it is true to say that ordinarily and unless there are circumstances to show that different meaning was intended, the word 'cash' refers to some sort of currency such as coins, treasury notes

> or bank notes of fixed ascertained value and that it does not ordinarily mean a cheque of the value of which may be uncertain or which can be stopped by the drawer."

In our case there are, to use the learned Chief Justice's own words, "circumstances to show that a different meaning was intended". As I remarked in commencing this judgment, the counts we are concerned with are twelve trilogies, each of forging and uttering a cheque and stealing the cash represented by the very self-same cheque. It is sufficient to set out but one trio of such charges:

> "COUNT 3
>
> Statement of Offence
>
> Forgery, c/s 335 (*c*) and 337 of the Penal Code.
>
> *Particulars of Offence*
>
> EDWARD MWAISWANGWA KATENGELE, on or about the 5th August, 1967, at Dar-es-Salaam, Coast Region, with intent to defraud or to deceive, forged cheque No. D/053291 for Shs. 1,570/-, purporting to show that he was authorized to draw the money by Tanganyika Tourist Hotels.
>
> COUNT 4
>
> Statement of Offence
>
> Uttering a false document, c/s 342 of the Penal Code.
>
> *Particulars of Offence*
>
> EDWARD MWAISWANGWA KATENGELE, on or about the 7th August, 1967, at Dar-es-Salaam, Coast Region, knowingly and fraudulently uttered a forged cheque No. D/053291 for Shs. 1,570/- to National Bank of Commerce, Bank House Branch, Dar-es-Salaam, purporting to show that he was authorised to draw the money by Tanganyika Tourist Hotels.
>
> COUNT 5
>
> Statement of Offence
>
> Stealing by servant, c/s 265 and 271 of the Penal Code.
>
> *Particulars of Offence*
>
> EDWARD MWAISWANGWA KATENGELE, on or about the 7th August, 1967, at Dar-es-Salaam, Coast Region, being a book-keeper employed by M/S Tanganyika Tourist Hotels (Cordura Ltd.) stole cash Shs. 1,570/-, the property of his employers, which cash came into his possession by virtue of his employment."

It is thus abundantly clear that the cash Shs. 1,570/- is the money referable to the cheque the appellant forged and uttered, as laid in the previous two counts, particularly so as the eleven other trios of charges followed exactly the same pattern. The appellant could not, therefore, in the least have been under any misapprehension as to the charges he was facing. Again the learned Chief Justice, in the same passage cited, stated:

> ". . . It cannot be said that anyone reading the counts in this case would necessarily assume from their terms that it was intended to charge the appellant with stealing a cheque."

In our case, I would say, employing the terminology of the learned Chief Justice, it cannot be said that anyone reading the counts in this case could not but

assume from their terms that it was intended to charge the appellant with stealing cheques.

On the application of first principles, as set out in the judgment cited, actually originating from an English case, that:

> "It is an essential feature of the criminal law that an accused person should be able to tell from the indictment the precise nature of the charge or charges against him, so as to be in a position to put forward his defence and to direct his evidence to meet them."

I have not the slightest hesitation in holding that the charges as laid were in law sufficiently specifically particularized, as the appellant could not have had the slightest doubt as to the nature of the charges he was facing and what he had to meet. It should, however, be added that, as advised in *Menzour's* case, a better description in such cases would be "a cheque for Shs. . . ."

To revert to the facts, it should, I think, be remarked that just as in the case of the forgery and uttering counts, even if the appellant's allegation of a conspiracy is accepted, it would not constitute a defence to these charges, likewise it would not constitute a defence to the stealing charges. The property stolen was not that of either Mr. or Mrs. Lockhurst, but that of the company which employed them all. Learned State Attorney submitted that the appellant's defence was but a case of "distributing the guilt" and that, therefore, did not exonerate the appellant from his own guilt. The appellant who, as remarked, conducted his case with considerable ability, countered this submission by asserting that as Mr. Godinho told him that the scheme was authorised by Mr. Lockhurst, he thought that the arrangement was perfectly proper and in order. If this could be accepted it could, I think, constitute a defence to the charge of stealing, as being a claim of right made in good faith. However, as remarked, the appellant impressed me as intelligent, and nobody but a cretin of the lowest order could possibly believe that such a conspiracy to defraud the company of such large sums could be other than criminal. The appellant knew perfectly well that in making these cheques payable to himself and showing the amounts represented by them as having been paid to tradesmen, he was defrauding, in fact, stealing from the company, whether on behalf of himself alone, or on behalf of himself together with his associates, as he alleges, though as, I think, sufficiently indicated, I fully agree with the learned magistrate that the appellant was acting on behalf of himself alone and no one else was implicated in these thefts from the company and that he did not share the proceeds from the cheques with any other employee of the company.

The appeal of the Republic is accordingly allowed, and the acquittals on all these counts of stealing are set aside, and the appellant is formally convicted on all these counts of stealing as charged.

With regard to sentence, although the prosecution stated that the appellant had previous convictions, which included fraudulent false accounting and stealing as a clerk, the appellant denied the convictions. The court did not have the convictions proved, and the learned magistrate in sentencing, stated that he was treating the appellant as a first offender. I would go further and add that even if the convictions had been proved, as the last of them was twelve years ago I would still treat the appellant as a first offender. Even so, the offences cannot be regarded as other than serious. As remarked by the learned magistrate in sentencing him on the forgery and uttering convictions, the appellant was "placed in a position of trust, and he set himself deliberately to defraud his employers over a long period by forging and uttering false cheques (and) the sums he has obtained are large". Had the learned magistrate convicted the appellant, the maximum sentence he could have imposed on each of the

stealing counts was three years, although he could have doubled this punishment by ordering some of the sentences to run consecutively to each other. However, in a case of this nature, it is the usual practice, from which I do not think a departure would be warranted, to order the sentences imposed to run concurrently with each other. Although, as this is an appeal, I am of the view that this court in its appellate jurisdiction is not limited to the maximum sentence which could be imposed by the lower court, in all the circumstances of this case, I consider the appropriate sentence on each of the counts of stealing to imprisonment for three years, the sentences to run concurrently with each other.

In the result, the appeal of the appellant is dismissed in its entirety, and that of the Republic is allowed, the acquittals on the stealing counts are set aside and convictions are entered on all twelve such charges. And the appellant is sentenced on each of such convictions to imprisonment for three years, to run concurrently with each other and with the sentences imposed on the other convictions.

Appeal against convictions dismissed.

Appeal against acquittals allowed.

The appellant appeared in person.

For the respondent:
M Ismail (State Attorney, Tanzania)
Attorney-General, Tanzania.

Allarakhia v Aga Khan
[1969] 1 EA 613 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	7 February 1969
Case Number:	38/1968 (102/69)
Before:	Biron J
Sourced by:	LawAfrica

[1] Jurisdiction – District Court – A District Court in Dar-es-Salaam presided over by a Senior Resident Magistrate is not a Resident Magistrate's Court with the jurisdiction of the latter court.

[2] Jurisdiction – Consent – Submission by consent of parties of jurisdiction of a court cannot confer jurisdiction upon that court.

[3] Rent Restriction – Jurisdiction – District Court has no jurisdiction to order possession – Rent Restriction Act 1962, *ss.* 4 *and* 19*; Magistrates Courts Act* 1963, *s.* 6 (*T.*).

Editor's Summary

The Dar-es-Salaam District Court granted a landlord vacant possession of a flat occupied by a tenant on the strength of a certificate from the Minister under s. 19 (1) (*n*) of the Rent Restriction Act. On appeal to the High Court the first ground contended was that the District Court had no jurisdiction to entertain the matter. The court with jurisdiction to deal with matters under the Rent Restriction Act is "a Court of a Resident Magistrate of competent jurisdiction" (s. 4 of the Act). The point for determination was whether the District Court presided over in fact by a Senior Resident Magistrate was such a court of competent jurisdiction. By s. 6 of the Magistrates Courts Act 1963 the Chief Justice has to establish such a court by order in the *Gazette*, and by Government Notice No. 484 of 1964 there was created such a court, namely the Court of the Resident Magistrate of Dar-es-Salaam which was not the Court which heard the application for possession in this case.

Held –

(i) the District Court was not a court of a Resident Magistrate, each being of a different grade irrespective of whether or not a Resident Magistrate presided over a District Court;

(ii) parties may not by mutual consent confer jurisdiction upon a court which has no such jurisdiction;

(iii) the District Court had no jurisdiction to make the order for possession. Appeal allowed with costs, and judgment of District Court set aside.

Cases referred to in judgment:

(1) *Imperial Oil Soap and General Mills Co. Ltd., Delhi v. Ram Chand* (1916), A.I.R. Lahore, 78 (2).

(2) *Ledgard v. Bull* (1866), L.R. 13 Ind. App. 134.

(3) *Dayaram Jagivan v. Govardhandas Dayaram* (1904), (I.L.T.) 28 Bom. 458.

Judgment

Biron J: This is an appeal from the judgment and order of the Dar-es-Salaam District Court granting the respondent landlord possession of a flat occupied by the appellant. The flat in question is one of six comprised in a three-storey building. The landlord is desirous of demolishing this building and constructing a five-storey one, the ground floor to be let off as shops, the first floor as offices, and the remaining floors will be divided into thirty-eight residential flats. The landlord has obtained the necessary planning permission, and also a certificate from the Minister in accordance with s. 19 (1) (*n*) of the Rent Restriction Act 1962, one of the provisions whereunder a court may grant possession and which reads that:

> "the landlord requires possession of the premises for purposes of redevelopment otherwise than as a dwelling house and the Minister has certified that such re-development is in the public interest."

The certificate from the Minister is in the following form:

"THE RENT RESTRICTION ACT, 1962

(No. 42 of 1962)

Minister's Certificate

Made under Section 19 (1) (*n*) of Act No. 42 of 1962.

WHEREAS it is provided in paragraph (*n*) of Section 91 of the Rent Restriction Act, 1962, that the Minister responsible for Justice may certify the re-development of the premises to be in the public interest:

NOW THEREFORE, in exercise of the powers conferred by Section 19 (1) (*n*) of the said Act, it is hereby certified that the re-development for commercial purposes of the ground floor and the 1st floor of the storey building erected on Plot No. 436/129, Syed Bargash Street, Dar es Salaam, is in the public interest.

Given under my hand at Dar es Salaam this 31st day of December, 1966.

Sd. R. M. Kawawa.

Second Vice-President."

It was submitted by the tenant, who appeared in person before the trial court, that the provision above set out whereunder the landlord sought possession would not apply, as the building the landlord proposed to

put up was to be used for residential purposes as well, in fact, mainly for residential purposes,

and therefore it cannot be said that possession was required for purposes of "re-development otherwise than as a dwelling house", as provided for in the sub-section. The learned magistrate, however, found against the tenant on his submission, saying that the proposed building could not be termed "purely residential". He also held that it was in the public interest that the proposed building be constructed, and he accordingly granted possession of the suit premises. It is from this order that this appeal has been brought.

Various grounds of appeal have been set out in the memorandum of appeal and duly canvassed by learned counsel for the appellant. The first ground as set out in the memorandum of appeal is that:

> "The learned Senior Resident Magistrate erred in law in failing to appreciate that the Court had no jurisdiction in the matter."

By s. 11A (1) of the Rent Restriction (Amendment) (No. 2) Act 1966:

> "All claims, proceedings or other matters of a civil nature arising out of this Act or any of the provisions thereof and in respect of which jurisdiction is not specifically conferred upon the Tribunal shall be commenced in the court and the court shall have jurisdiction to deal with such claims, proceedings and other matters of a civil nature, notwithstanding that by reason of the amount of claim or the value of the subject matter or otherwise, the claim, proceedings or matter would not, but for the provisions of this section, lie within the jurisdiction of the court, and the court shall, in any such claim, proceedings or matter, in addition to the powers which such court may ordinarily have in any proceedings of a civil nature, have power to do all things which it is required or empowered to do by or under the provisions of this Act, and without prejudice to the generality of the foregoing shall have power –
>
> (*a*) to determine whether or not any premises whatsoever are premises to which this Act applies;
>
> (*b*) to make orders, upon such terms and conditions as it shall think fit, for the recovery of possession and for the payment of arrears of rent or mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation or possession of any premises."

The remainder of the section is not relevant. And by s. 4 of the same Act:

> " 'The court' means a court of a Resident Magistrate of competent jurisdiction."

The suit was heard and determined in the District Court of Dar-es-Salaam. It is therefore submitted on behalf of the appellant tenant that the court had no jurisdiction, which lies only in the court of the Resident Magistrate.

By s. 6 of the Magistrates' Courts Act 1963:

> "(1) The Chief Justice may, by order in the *Gazette*, establish courts of a resident magistrate which shall, subject to the provisions of any law for the time being in force, exercise jurisdiction in such areas as may be specified in such order.
>
> (2) The designation of a court of a resident magistrate shall be that specified in the order establishing the same.
>
> (3) The variation of the designation of a court of a resident magistrate or of the area within which such court may exercise jurisdiction, shall not affect the jurisdiction of such court to continue the hearing of, or to determine, any proceeding commenced therein prior to such variation."

By the Magistrates' Courts (Courts of a Resident Magistrate) Order (Government Notice No. 484 of 1964), the court of the resident Magistrate of Dar-es-Salaam, having jurisdiction over the Coast Region, was duly established. It is contended that it is this court which has jurisdiction in this case, and that the order of the District Court of Dar-es-Salaam is ultra vires as that court has no jurisdiction.

Learned counsel for the landlord submitted, firstly, that the case had in fact been tried by a Resident Magistrate, as the court was presided over by a Resident Magistrate, actually a Senior Resident Magistrate; and, secondly, if objection had been taken at the trial, the plaint could have been returned to be presented to the Court of the Resident Magistrate, in accordance with O. 7, r. 10 of the First Schedule to the Civil Procedure Code 1966. He therefore further submits that this court had a corresponding power under s. 76 of the Civil Procedure Code, which reads:

> "(1) Subject to such conditions and limitations as may be prescribed, the High Court in the exercise of its appellate jurisdiction shall have power –
>
> (*a*) to determine a case finally;
>
> (*b*) to remit a case for re-trial;
>
> (*c*) to frame issues and refer them for trial;
>
> (*d*) to take additional evidence or to require such evidence to be taken.
>
> (2) Subject as aforesaid, the High Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on courts of original jurisdiction in respect of suits instituted therein."

With regard to the first submission, that the order was in fact made by a Resident Magistrate because the court which made the order was presided over by a Resident Magistrate, actually a Senior Resident Magistrate, the Magistrates' Courts Act above referred to provides for the establishment of the several courts, primary courts, District Courts and courts of a Resident Magistrate. Although by s. 7 (1) of the Act:

> "A magistrate's court shall be duly constituted when held by a single magistrate, being –
>
> (*a*) in the case of a primary court, a primary court magistrate;
>
> (*b*) in the case of a district court, a district magistrate:
>
> Provided that where jurisdiction is conferred on a district court only when held by a magistrate of a particular description, such court shall not be duly constituted for the exercise of such jurisdiction unless held by a magistrate of that description;
>
> (*c*) in the case of a court of a resident magistrate, a resident magistrate",

the fact that a court is presided over by a magistrate of a particular grade does not, ipso facto, transform that court into the class of the magistrate's grade. It is expressly provided for in the Act that each class of court shall have its own register and its own prescribed seal. These instant proceedings were heard and tried by the District Court of Dar-es-Salaam, and the order and decree had issued from that court bearing the seal of such court. Therefore, in my judgment, despite the fact that the court was presided over by a Senior Resident Magistrate, the trial was in fact held in, and the order and decree made by, the District Court of Dar-es-Salaam, which court has, as indicated, no jurisdiction to try such suit. This first submission therefore fails.

With regard to the second submission, whilst, with respect, I agree that this court on appeal has similar powers to the trial court from which the appeal has

been brought, that is, it could return the plaint to be presented to the proper court, that, however, is a very far cry from upholding an order of a court which had no jurisdiction to make such order.

Learned counsel for the respondent landlord further submits that although the District Court had no jurisdiction nonetheless its order is valid. He relied for his submission on two cases. The first is that of *Imperial Oil Soap and General Mills Co. Ltd., Delhi v. Ram Chand* (1916), A.I.R. Lahore 78 (2). That case, however, to my mind, is of no assistance to the respondent, as the case was in fact dealt with and decided by a court which had jurisdiction. The only irregularity was that it had been transferred to that court by a court which itself had no jurisdiction. It is sufficient, I think, to quote the relevant part of the headnote, which reads:

> "Where in a case which a court is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute the jurisdiction of the Court upon the ground that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit."

In this case it is not disputed that the District Court which dealt with the case and made the order appealed from had no jurisdiction. It is not irrelevant to quote from the judgment of the case itself, at p. 79, quoting in turn from a judgment of the Privy Council in *Ledgard v. Bull* (1866), L.R. 13 Ind. App. 134 that:

> "When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit."

The other case relied on by learned counsel is that of *Dayaram Jagivan v. Govardhandas Dayaram* (1904), I.L.T. 28 Bombay 458. The facts of that case were, quoting from the report, that:

> "The plaintiff obtained a money decree, No. 17520 of 1900, in the Court of Small Causes at Bombay against the defendant and four others. The decree was sent to the Court of the Subordinate Judge at Dahanu for execution and the lands and houses mentioned in the application for execution, *darkhast* No. 351 of 1901, were attached. Thereupon, the defendant, one of the judgment-debtors, applied to raise the attachment on the ground that the said property did not belong to him personally, but he was merely a trustee in possession, the property being assigned to religious purposes towards which the income was devoted and therefore the said property was not liable to attachment and sale.
>
> The plaintiff (decree-holder) replied that he was not aware of the assignment; that the property was not used for charitable purposes; that the judgment-debtors were the owners of it and received the income thereof, and that the deed of assignment, if proved, was a fraudulent and colourable transaction.
>
> The Subordinate Judge held that the applicant had settled upon himself the property in question as trustee for charitable purposes. He, therefore, removed the attachment.

> On appeal by the plaintiff the Judge reversed the order holding that though the assignment to religious purposes was proved, it was made with intent to defraud or defeat or delay the defendant's creditors; that the transfer was voidable at the option of the plaintiff, and that the property was liable to attachment and sale in execution of the plaintiff's decree.
>
> The defendant preferred a second appeal."

In his judgment Jenkins, C.J., after directing himself that the first appeal was incompetent in that no appeal lay from the order removing the attachment, went on to say and conclude his judgment with:

> ". . . now a second appeal is brought here. But this second appeal will not lie on the appellant's own showing, because his first objection is that the lower Court ought to have held that no appeal lay in this case. That objection in our opinion is a sound one. Accordingly we have allowed the appellant to take the only course properly open to him, and have allowed this appeal to be treated as an application to us under section 622 of the Civil Procedure Code, and what we have to decide is whether so treating this proceeding we ought to set aside the order of the District Judge.
>
> We are of opinion that it was passed without jurisdiction; but the present appellant took no such objection before the District Court and if we were now to set aside the order of the District Court, it would have the effect of placing the present respondent in the position of being obliged to bring a suit to establish the right which he claims to the property in dispute though the period within which he was entitled to bring that suit has elapsed; in other words we should be placing him under an obligation to bring a suit that, *prima facie*, would be barred by article 11 of the Limitation Act. No doubt the Court before whom that suit might come might be disposed to excuse delay, but we can give Mr. Desai's client no assurance that this would be the result, and under the circumstances we think it would be unjust to the respondent to set aside the order of the District Court. The result of our lesser of the two evils, because as far as we can at present see the appellant before us will not be met by any plea of limitation which would, unless excused, be a bar in the way of a suit by the respondent, though on this we refrain from expressing any positive opinion.
>
> Accordingly, treating this as an application for our interference under section 622 of the Code, we dismiss it with costs."

Section 622 of the Civil Procedure Code referred to corresponded to s. 150 of the 1882 Code, which corresponded to s. 115 of 1908 Code and which in turn corresponds to s. 79 of our Civil Procedure Code, which reads:

> "(1) The High Court may call for the record of any case which has been decided by any court subordinate to the High Court and in which no appeal lies thereto, and if such subordinate court appears –
>
> (*a*) to have exercised a jurisdiction not vested in it by law; or
>
> (*b*) to have failed to exercise a jurisdiction so vested; or
>
> (*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity,
>
> the High Court may make such order in the case as it thinks fit.
>
> (2) Nothing in this section shall be construed as limiting the High Court's power to exercise revisional jurisdiction under the Magistrates' Courts Act, 1963."

That case can also easily be distinguished from this instant case in that there

the second appeal, like the first appeal, was incompetent and the only way the court could deal with it was in revision, and, for the reasons given, that any order made would be to the prejudice of the respondent in that the new action he would bring would be time-barred, the court refused to interfere. This instant appeal before this court is competent and must accordingly be dealt with by this court in its appellate jurisdiction. As the district court had no jurisdiction to make the order it did, to my mind, this lack of jurisdiction is fatal and I fail to see how this court on appeal could possibly uphold such order made without jurisdiction.

In view of my finding on this first ground of appeal, it is not necessary to deal with the other grounds, which I think it must be conceded are not without substance, but any ruling on them would be obiter.

In the circumstances, for the reasons I have attempted to set out, I consider myself constrained to uphold the submission that the order of the district court cannot be upheld, as it was made without jurisdiction.

The appeal is accordingly allowed, with costs to the appellant, and the judgment of the district court is set aside.

Appeal allowed.

For the appellant:
AA Lakha
Fraser Murray, Roden & Co, Dar-es-Salaam

For the respondent:
HG Kinariwalla
Sayani, Balsara & Velji, Dar-es-Salaam

Hard Fibres v Tanganyika Electric Supply Co Ltd
[1969] 1 EA 619 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	14 February 1969
Case Number:	55/1969 (103/69)
Before:	Georges CJ
Sourced by:	LawAfrica

[1] Company Law – Receiver – Agent of company.

[2] Contract – Waiver – Receiver of company – New contract with receiver not waiver of rights against company.

[3] Electricity – Supply – Right of disconnection – Whether it may be exercised against company in

receivership – Electricity Ordinance (*Cap.* 131), *s.* 78 (*T.*).

Editor's Summary

The defendant was licensed under the Electricity Ordinance to supply electricity. It supplied electricity to Hard Fibres Ltd. until that company failed to meet its bill. The supply was then cut off. The company was then put into receivership and the receiver on behalf of the company entered into a new agreement with the defendant for the supply of electricity, the cost of which was paid regularly. As the previous bill was not paid, the defendant threatened to cut off the supply again. The plaintiff applied for an injunction to restrain it from so doing.

Held –

(i) a receiver appointed by a mortgagee under a deed is an agent of the mortgagor (*Jefferys v. Dickson* (1) followed);

(ii) the person being supplied with the current was therefore the same person which owed the unpaid bill and the defendant was entitled to cease supplying the current;

(iii) the defendant had not waived its rights by signing a new agreement with the receiver.

Suit dismissed.

Cases referred to in judgment:

(1) *Jefferys v. Dickson* (1866), L.R. 1 Ch. App. 183.

(2) *Husey v. London Electricity Supply Corp.*, [1902] 1 Ch. 411.

Judgment

Georges CJ: The facts in this matter have been agreed and may be shortly summarised. The defendant company have a licence under the Electricity Ordinance (Cap. 131) to supply electricity in this country. They did in fact supply power to a factory at Kwamdoro operated by the plaintiff company under an agreement dated March 7, 1966. The plaintiff company failed to meet its bill and the supply was cut off on October 2, 1967.

On October 3, 1967, the plaintiff company went into Receivership. Mr. Nielsen was appointed Receiver by the National Bank of Commerce as holders of a debenture charging all the assets of the company.

On October 5, 1967, Mr. Nielsen on behalf of the plaintiff company signed an agreement with the defendant company for the supply of electricity. At the time of the signing of the agreement he stated that he had been appointed Receiver by the Debenture Holder.

Since the signing of the agreement of October 5 the defendant company has supplied power to the plaintiff company which has duly met all charges. There still remains due the sum of Shs. 9,670/ – owing by the plaintiff company at the time the supply was cut off on October 2, 1967. This amount was not carried as a debit on bills sent to the Receiver but the defendant company is now pressing for payment of that sum and threatens to cut off the supply unless prompt payment is made. The plaintiff company contends that they are not entitled to do this and in this suit seek an injunction to restrain them from so doing.

Section 78 (1) of the Electricity Ordinance reads as follows:

> "In any case where a person neglects to pay any charge for energy or any other sum due from him to a licensee in respect of the supply of energy the licensee may, after giving not less than forty-eight hours' notice in writing to such person and without prejudice to his right to recover such charge or sum, other than a charge for energy, cut off the supply, and for that purpose cut or disconnect any electric supply-line or other works, being the property of the licensee, through which energy may be supplied, and may discontinue the supply until such charge or sum, together with any expenses incurred by him in cutting off and re-connecting the supply are paid, but no longer."

The question for determination would appear to me to be whether the "person" being supplied with electricity under the contract of October 5, 1967, is the same "person" who was being supplied under the contract of March 7, 1966.

I am of the opinion that it is the same person who is being supplied, and that person is the company – Hard Fibres Ltd.

A receiver appointed by a mortgagee under a power to that effect contained in a deed is an agent of the mortgagor: *Jefferys v. Dickson* (1866), L.R. 1 Ch. App. 183 at p. 190 *per* Lord Cranworth, L.C.

When Mr. Nielsen entered into the contract of October 5, 1967, he was doing so as an agent of the company. The person being supplied under that contract was the same person who was being supplied under the contract of June 7, 1967.

Prima facie, therefore, the defendant company would have the right to cut off the supply since there had been a failure to pay the sum of Shs. 9,670/ – due from the company to the licensee for energy supplied.

It was argued that the position here was somewhat different in that the defendant company must be taken to have waived its right by reason of its having entered into a fresh contract and of its having submitted bills in respect of that contract which did not carry as a debit item the Shs. 9,670/ – then admittedly due.

I do not think that there has been any waiver in this case. There could be no waiver because it is clear that the company was not aware it could refuse to supply electricity to the Receiver unless he paid the sum then owing by the company. This misapprehension was in part due to the circular letter sent out by the Receiver which stated among other things that his appointment effectively prevented creditors from taking

> "action against the company in pursuit of your claims until my appointment is terminated following the completion of repayment of the company's liabilities to my appointors".

Later when the defendant company pressed for payment on threat of cutting off the supply of energy the Receiver by letter dated November 15, 1967, pointed out that the defendant company's manager was under a misapprehension as to the position as he, the Receiver, was not empowered to apply monies received by him in the management of the business in any other way but towards the satisfaction of the debenture holder's debt.

The position is therefore that the defendant was unaware of its legal rights on October 5, 1967, when it entered into the contract with the Receiver and never waived them. As soon as it was properly advised, it insisted that the debt be paid as early as October 26, 1967. In those circumstances the failure to submit bills with the arrears shown is not meaningful.

I would agree that the contract of October 5, 1967, was a valid contract. It was not entered into under any mistake of fact. The defendant company knew that it was entering into an agreement with the Receiver. It did not clearly grasp that he was merely the agent of the plaintiff company.

Although that contract is valid, the person to whom electricity is now being supplied is the same person who owes the defendant company Shs. 9,670/ – and the defendant company is entitled to cut off the supply of energy unless that sum is paid.

I have considered the case of *Husey v. London Electric Supply Corp*., [1902] 1 Ch. 411. Mr. Riegels has argued from dicta in that case that had a new contract been entered into between the Receiver and the Electric Company the position would have been different and the Electric Company would not have had the right to cut off the supply. I do not think that this would necessarily have been the conclusion which would have been reached. The court just did not consider what would have been the result if that had been the case. It seems to me that once the Receiver enters into a contract on behalf of the company he cannot escape the consequences of the debt due from the company to the supplier.

It is true that, in effect, the defendant company will have put itself in a position

where it can compel priority payment of its debt by the threat of cutting off the supply of power but in the circumstances this is irrelevant.

Action dismissed with costs.

For the plaintiff:
M Riegels
Donaldson & Wood, Dar-es-Salaam

For the defendant:
RS Grimble
Fraser Murray, Roden & Co, Dar-es-Salaam

Republic v Robert and another
[1969] 1 EA 622 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	26 December 1968
Case Number:	138 and 139/1968 (104/69)
Before:	Biron J
Sourced by:	LawAfrica

[1] Criminal Practice and Procedure – Charge – Laid under statute not yet in force – Proceedings a nullity.

Editor's Summary

The accused were charged with, and convicted on their own pleas, of being in possession of moshi without a licence, contrary to the Moshi (Manufacture and Distillation) Act 1966. That Act had not yet been brought into force, as required, by notice in the *Gazette*.

Held – the proceedings were a nullity (*R. v. Indo Parsad Jamietram Dave* (1) distinguished).

Convictions quashed and sentences set aside.

Cases referred to in judgment:

(1) *R. v. Indo Parsad Jamietram Dave*, [1963] E.A. 65.

Judgment

Biron J: The two accused were together convicted on their own pleas of being in possession of moshi without a licence, contrary to the Moshi (Manufacture and Distillation) Act 1966 and the first accused, a man, was sentenced to imprisonment for twelve months whilst the second accused, a woman, whose relationship to the first accused is not specified, was sentenced to a fine of Shs. 500/ – or imprisonment for six months in default.

The question that poses itself is whether the convictions can be sustained, as by s. 1 of the Act whereunder they were charged and convicted "it shall come into operation on such date as the Minister may by notice in the *Gazette* appoint", and to date the Minister has not appointed any date. The accused were therefore convicted under a legislative provision which has not as yet been brought into operation.

In *R. v. Indo Parsad Jamietram Dave*, [1963] E.A. 65, where the accused was similarly convicted of an offence under an Act, or, rather, an Ordinance, as statutes were then termed, which at the time of the commission of the offence had not as yet been brought into operation, though it was subsequent to the commission of the offence, the conviction was upheld. However, that case can very easily be distinguished from this instant one. In that case the accused was convicted under the Pharmacy and Poisons Ordinance (Cap. 416, Revised Laws), which repealed and replaced the Pharmacy and Poisons Ordinance (Cap. 94,

Revised Laws), and the particular provisions whereunder the accused was convicted corresponded verbatim with the provisions under the old ordinance which it repealed and replaced and the offence was the same in every essential under both ordinances. In this case the new Act does not repeal and replace the Local Liquor Act (Cap. 77, Supp. 44) whereunder the possession of moshi is an offence, and which Act, incidentally, is still in force. The two Acts are entirely different, and with different objectives. The old Act regulates the manufacture, sale and possession of local liquor in general, whereas the new Act is limited to regulating the manufacture, possession and sale of moshi alone. By s. 36 (1) of the Local Liquor Act, "it shall be lawful for the President, by order published in the *Gazette* to prohibit the manufacture, preparation, sale or possession by any person of any local liquor specified in such order". In pursuance of this section, the Local Liquor (Moshi) Order 1941 was passed and promulgated, and this order prohibits the manufacture, preparation, sale or possession by any person of moshi. The new Act which has not as yet come into force, as noted, is not intended to replace the old Act. In fact, it permits the manufacture, sale and possession of moshi, provided such manufacture, sale or possession is under licence, as provided for in the Act, and by s. 40 of the Act the Local Liquor (Moshi) Order 1941 is revoked. The offence of possession of Moshi is therefore not the same under the two Acts, as under the old Act even the possession of moshi is totally prohibited, whereas under the new Act even its manufacture is permitted under licence.

This case can further be distinguished from the other case in that there, as expressly stated by Windham, C.J., in his judgment, and repeated in the headnote, the accused was in no way prejudiced whether the offence was charged under the old or the new ordinance. In this instant case, however, the accused were gravely prejudiced in being charged under the new Act, as under such Act the penalty for unlawful possession of moshi, as provided for in s. 30, is imprisonment for a term not exceeding five years, whereas the penalty under the old and extant Act, as provided for in s. 36 (2) is a fine of Shs. 4,000/ – or imprisonment for two years, or a combination of such fine and imprisonment. And it is abundantly clear from the record that the heavy penalty imposed by the new Act very much weighed with the learned magistrate in imposing sentence, as he expressly stated in passing sentence that Parliament had provided for a sentence of imprisonment for five years for the offence.

In the circumstances, the proceedings are, and are hereby formally so declared to be, a nullity; the convictions, which are not supported by the Director of Public Prosecutions, are quashed, and the sentences imposed thereon are set aside. The fine paid by the second accused is to be refunded to her, and the first accused, unless lawfully detained in custody in some other connection, is to be released forthwith.

Should the accused be again arraigned on the same offence, but under the proper provisions, and convictions follow, consideration should be given to the time already spent by the first accused in custody.

Convictions quashed and sentences set aside.

Neither party appeared nor was represented.

Westcott v Republic

[1969] 1 EA 624 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	21 June 1969
Case Number:	19/1969 (106/69)
Before:	Sir Charles Newbold P, Duffus V-P and Law JA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanzania – Saidi, J

[1] Constitutional Law – United Nations Trusteeship Agreement 1946 *– Legislation ultra vires – Societies Ordinance* (*Cap.* 337), *s.* 6 (*T.*) *intra vires the Agreement.*

[2] Criminal Law – Unlawful society – Presumptions from possession of books, accounts, etc. – Whether all presumptions relate only to day of discovery of books, accounts, etc. – Societies Ordinance, s. 23 (*T.*).

[3] Criminal Law – Unlawful society – Presumptions from possession of books, accounts, etc. – Presumptions can operate retrospectively.

Editor's Summary

The appellant was convicted of being a member of an unlawful society and of assisting in its management. His appeal to the High Court was dismissed and he appealed to the Court of Appeal on the grounds that the Societies Ordinance, s. 6, was ultra vires the United Nations Trusteeship Agreement 1946 and invalid ab initio, together with the order under it declaring the society to be an unlawful society; that the presumptions set out in the Societies Ordinance, s. 23 were irrelevant to the charge and had not been independently proved, and that the magistrate had failed to warn himself that a prosecution witness (Mrs. Everett) was an accomplice and her evidence required corroboration. The facts are set out fully in the judgment.

Held –

(i) Societies Ordinance, s. 6 was intra vires the United Nations Trusteeship Agreement 1946 since it could have been used in ways which did not offend against Articles of the Agreement;

(ii) an order made under s. 6 could have been ultra vires if it had been made before Independence and if it had offended against Articles of the Agreement;

(iii) the order under s. 6 was made after Independence and when the Government of Tanzania was no longer subject to the Agreement;

(iv) the reference to the day of the discovery of documents in the Societies Ordinance, s. 23 relates only to the presumption that the society exists;

(v) the presumptions created by s. 23 can operate retrospectively;

(vi) the presumption created by the discovery of the books and documents could be applied retrospectively to cover the periods of time during which the appellant was alleged to have been a member of the society;

(vii) the charge of assisting in the management of the society had been proved by direct evidence without reference to any presumption;

(viii) the magistrate did not appear to have relied on Mrs. Everett's evidence in convicting the appellant; but her evidence was in any event corroborated.

Appeal dismissed.

No cases referred to in judgment

Judgment

Law JA: read the following considered judgment of the court: This is a second appeal. The appellant was convicted on three counts of being a member of an unlawful society, contrary to s. 19 (1) of the Societies Ordinance (Cap. 337) and on two counts of assisting in the management of an unlawful society, contrary to s. 20 of the Societies Ordinance. He appealed to the High Court (Saidi, J.), and was successful to the extent that the convictions on two counts relating to a society known as the International Bible Students Association were quashed, but the appeal was dismissed in relation to the other three counts, which read as follows:

> "COUNT 3
>
> *Statement of Offence*
>
> Assisting in the management of an unlawful society, contrary to section 19 (1) of the Societies Ordinance, Cap. 337.
>
> *Particulars of Offence*
>
> DEREK GEORGE WESTCOTT, between the months of July, 1965 and August, 1967, in the Coast Region, assisted in the management of an unlawful society to wit Jehovah's Witnesses.
>
> COUNT 4
>
> *Statement of Offence*
>
> Being a member of an unlawful society, contrary to section 20 of the Societies Ordinance, Cap. 337.
>
> *Particulars of Offence*
>
> DEREK GEORGE WESTCOTT, between the months of July, 1965 and August, 1967, in the Coast Region, was a member of an unlawful society to wit Jehovah's Witnesses.
>
> COUNT 5
>
> *Statement of Offence*
>
> Being a member of an unlawful society, contrary to section 20 of the Societies Ordinance, Cap. 337.
>
> *Particulars of Offence*
>
> DEREK GEORGE WESTCOTT, between the months of July, 1965 and August, 1967, in the Coast Region, was a member of an unlawful society to wit Watch Tower Bible and Tract Society."

By s. 28 of the Societies Ordinance the consent of the Director of Public Prosecutions is required to prosecutions under the Ordinance and this was duly given in the form of an endorsement to the charge sheet.

By s. 6 of the Societies Ordinance the President is given the power to declare any society to be unlawful. The relevant part of the section reads as follows:

> "(1) It shall be lawful for the President, in his absolute discretion, where he considers it to be essential in the public interest, by order to declare to be unlawful any society which in his opinion: –
>
> (*a*) is being used for any purpose prejudicial to, or incompatible with, the maintenance of peace, order and good government."

On June 11, 1965, the following Order appeared in the Tanzania *Gazette* as Government Notice No. 287:

> "The Societies (Declaration of an Unlawful Society) Order, 1965.

1. This Order may be cited as the Societies (Declaration of an Unlawful Society) Order, 1965.

2. The Societies known as the Watch Tower Bible and Tract Society, Jehovah's Witnesses, the International Bible Students Association, Milennial Dawnists, Standfasters and Russelites are hereby declared to be unlawful.

BY COMMAND OF THE PRESIDENT

Dar es Salaam — J. M. Lusinde

5th June, 1965. — Minister for Home Affairs"

The effect of this notice, if it was validly made, was *inter alia* that as from June 11, 1965, it became an offence, under s. 20 of the Societies Ordinance, for any person to be a member of any society specified in the notice, and under s. 19 for any person to assist in the management of any such society.

The facts of the case the subject of this appeal are as follows. On February 28, 1968, Assistant Superintendent of Police Faleira obtained a search warrant authorising him to search a house at Ada Estate, Dar-es-Salaam for documents relating to the unlawful societies known as Jehovah's Witnesses, International Bible Students Association and Watch Tower Bible and Tract Society. The appellant's wife was at the house and the appellant arrived later. The house was searched in the presence of the appellant and a large quantity of documents was found in the bedroom, in a guest-room, and in the lounge. These included receipts for monthly subscriptions to a magazine called "Watchtower", "Year Books" of Jehovah's Witnesses, publisher's record cards in the names of the appellant, his wife, a Mrs. Q. Everett, and other people, letters and copies of letters, Watchtower publications in Swahili, English, Russian and French, and many books published by Watchtower Bible and Tract Society and International Bible Students Association, some bearing the appellant's name. These documents fill several cases and cartons.

Section 23 of the Societies Ordinance reads as follows:

"(1) Where any books, accounts, writings, lists of members, seals, banners or insignia of, or relating to, or purporting to relate to, any society are found in the possession of any person, it shall be presumed, until the contrary is proved, that such person is a member of such society, and such society shall be presumed, until the contrary is proved, to be in existence at the time such books, accounts, writings, lists of members, seals, banners or insignia are so found.

(2) Where any books, accounts, writings, lists of members, seals, banners or insignia of, or relating to, any society are found in the possession of any person it shall further be presumed, until the contrary is proved, that such person assists in the management of the society."

At the trial, evidence was given by Mr. Faleira, who produced and described the documents seized by him; by Mr. Saudi who knows the appellant's handwriting and deposed that certain of the documentary exhibits were in a handwriting resembling that of the appellant; and by Mrs. Q. Everett who deposed that she became a member of Jehovah's Witnesses and was baptized as such by the appellant and another man on November 10, 1966. Mrs. Everett was cross-examined as to the reliability of her memory. The other prosecution witnesses were not cross-examined, and no evidence whatsoever was called for the defence. The learned Senior Resident Magistrate in the course of his judgment commented that the documentary evidence found in the appellant's possession showed that the appellant was a member and organizer of the societies named in the charges "from the day these societies were proscribed to the day when

the material was found in his house", that is to say, from June 11, 1965, to February 28, 1968, and he proceeded to find the appellant guilty "on all counts as charged".

On appeal to the High Court the convictions on the first two counts were quashed on the ground that the documentary evidence relating to these counts had not been proved. The learned judge found that only certain of the documents had been proved satisfactorily and that these, coupled with the evidence of Mrs. Everett were sufficient to support the convictions on the other three counts, in relation to which the appeal was dismissed.

For some reason which is not apparent to us the appeal in the High Court was conducted on the basis, which seems to have been accepted by both parties as well as the judge, that the magistrate had convicted the appellant of offences committed on dates other than those charged. This was not the position. The magistrate convicted the appellant of the offences "as charged", merely commenting that the evidence indicated that the offences had in fact been committed over a greater period than that specified in the counts charged. As a result of this peculiar misconception of the true position, much time was wasted in the High Court and much of the judgment devoted to such questions as whether the counts should have been amended, and whether the consent of the Director of Public Prosecutions had been effectively given to the counts on which the appellant was convicted. This disposes of ground 3 of the appeal in this court. Ground 1, which contends that possession by the appellant of the relevant documentary exhibits had not been proved, was not pressed in view of the concurrent findings to the contrary in both the courts below, with which findings we are in entire agreement. Before us Mr. Kapila for the appellant argued the remaining grounds of appeal under three main heads:

1. That section 6 of the Societies Ordinance was ultra vires the United Nations Trusteeship Agreement 1946 and therefore invalid ab initio, with the consequence that Government Notice No. 287 of 1965 was likewise invalid and null;
2. That the presumptions of fact arising out of section 23 of the Societies Ordinance were irrelevant to the offences with which the appellant was charged, and that the documentary exhibits had not been independently proved and were not therefore probative of the facts stated in them;
3. That the magistrate had failed to warn himself that Mrs. Everett was an accomplice and that her evidence accordingly required corroboration.

As regards head 1, the relevant articles of the Trusteeship Agreement are 5, 13 and 14, the relevant parts whereof read as follows:

"*Article* 5

. . . the Administering Authority (that is to say, the British Government)

(*a*) shall have full powers of legislation in Tanganyika, subject to the provisions of the United Nations Charter and of this Agreement.

Article 13

The Administering Authority shall ensure in Tanganyika complete freedom of conscience, and, so far as consistent with the requirements of public order and morality, freedom of religious teaching and the free exercise of all forms of worship . . . Missionaries who are nationals of Members of the United Nations shall be free to enter Tanganyika and to travel and reside therein, to acquire and possess property, to erect

> religious buildings, and to open schools and hospitals in the Territory. The provisions of this Article shall not, however, affect the right and duty of the Administering Authority to exercise such controls as he may consider necessary for the maintenance of peace, order and good government and for the educational advancement of the inhabitants of Tanganyika, and to take all measures required for such control.
>
> *Article* 14
>
> Subject only to the requirements of public order, the Administering Authority shall guarantee to the inhabitants of Tanganyika freedom of speech, of the press, of assembly and of petition."

Mr. Kapila's argument, as we understand it, is that the Trusteeship Agreement fettered the legislative power of the Administering Authority by prohibiting legislation purporting to confer a power to suppress in toto the freedom of conscience, the practice of religion and the exercise of fundamental rights. In respect of religious teaching and worship in particular, Mr. Kapila submitted that the powers of the Administering Authority are restricted to controlling, as opposed to suppressing, such activities, and that the enactment in 1954 of s. 6 of the Societies Ordinances, which confers a power to suppress by declaring a society to be unlawful, was ultra vires the Trusteeship Agreement, null and void from the moment of its enactment, and incapable of being used by the Administering Authority's successor the Government of Tanzania.

The words "complete freedom of conscience" are general words which are not defined and it is doubtful if they are capable of definition. So far as they include religious teaching and all forms of worship, complete freedom in these respects is subject to qualifications:

(*a*) it must be consistent with "the requirements of public order and morality" and

(*b*) it is subject to the right of the Administering Authority to exercise "such controls as he may consider necessary for the maintenance of peace, order and good government";

and so far as the words include the basic freedoms of speech, of the press, of assembly and of petition, these freedoms are guaranteed subject only to the requirements of public order. As regards religious activities, Mr. Kapila submitted that the power to proscribe goes beyond the exercise of mere control. Assuming that he is right in this, does it follow that s. 6 of the Societies Ordinance which confers on the President an unfettered right to proscribe any society, is wholly ultra vires the Trusteeship Agreement? We do not think so. There are many societies other than those connected with the exercise of religion, such as social, sporting and educational clubs and associations, and any such society, whatever its designation, might be indulging in sedition, treason or obscenity, to give only a few examples. The best way to control such a society, and to satisfy the requirements of public order, morality, and good government, is to declare it unlawful. To that extent s. 6 would be intra vires the Trusteeship Agreement. We cannot therefore accept the submission that s. 6 is and always has been invalid in toto. However an order under that section might have been ultra vires the Trusteeship Agreement if it had been made before Tanzania became independent and purported to ban legitimate religious activity or a basic freedom in breach of the clear intendment of the Agreement, but this has not been shown to us to be the position in relation to the proscription of the societies mentioned in the charges. We have no information about them and their activities whatsoever. Notwithstanding their descriptions, these societies may for all we know have been indulging in most undesirable activities of a non-religious character, their religious aspect being a mere front. The courts

will always assume, where a discretionary statutory power has been exercised, that it has been properly and lawfully exercised unless the contrary is shown. No effort whatsoever has been made by or on behalf of the appellant to show that the societies, the subject of the charges, are of such a nature as to fall under the protection of the Trusteeship Agreement. In any event the order declaring the societies to be unlawful was made after Tanzania became independent, and the right of the Government of Tanzania to legislate is absolute and unfettered by the Trusteeship Agreement. We consider that on this point the appeal fails.

The second head of argument relates to the presumptions arising out of s. 23 of the Societies Ordinance, which is set out earlier in this judgment. Three presumptions of fact are created by that section on the discovery of literature relating to a society in the possession of any person. They are:

1. a presumption that the person is a member of such society;
2. a presumption that the society is in existence on the day of such discovery; and
3. a presumption that the person assists in the management of the society.

Mr. Kapila submitted firstly that all these presumptions are only effective in relation to the day on which the discovery is made, but we are satisfied that on a proper interpretation of the section the reference to the day of discovery only relates to the presumption that the society exists. That this is so is supported by the fact that sub-s. (2) which creates the presumption of management contains no such reference. There is thus a general presumption, on the discovery of relevant documents, that the person in possession thereof is a member, and assists in the management, of the society. Mr. Kapila submitted that if there is such a general presumption, it can operate only in the future and cannot relate to any period prior to the presumption arising, so that the presumptions of membership and management can have no relevance to the charges which are stated to refer to periods prior in time to the discovery of the documents, but he quoted no authority in support of this proposition. It is true that most presumptions of fact operate only in futuro from the time they arise, and then with gradually diminishing effect. But a presumption of fact may also operate retrospectively; for instance the presumption that a person found in possession of recently stolen goods is the thief. This presumption does not arise until the goods are found, and it relates back to the date of the theft if not too remote in time. Whether or not the earlier date is too remote depends on the circumstances; and in this particular case the nature and date of the documents give rise to a strong inference that the appellant's membership of the proscribed societies ante-dated the discovery of the documents by several years and certainly covered the periods of time specified in the charges. A presumption of fact is, after all, no more than an inference which can reasonably be drawn from proved or admitted facts. This leads to Mr. Kapila's next submission, that the documentary evidence was not properly proved. In this connexion, it will be noted that by sub-s. (1) of s. 23 the presumptions of membership and existence arise if the documents are of a kind "relating or purporting to relate to" a proscribed society, whereas the words "or purporting to relate" do not appear in sub-s. (2) which creates the presumption of assisting in management. This may well be a drafting error, but we must take the legislation as we find it. We have already referred to the large number of books and periodicals found in the appellant's possession, all of which, according to Mr. Faleira, were published by the Watch Tower Bible and Tract Society and the International Bible Students Association. This was not disputed. In addition there were found several publishers' record cards, one bearing the appellant's name, and containing entries dated during the period covered by the charges. Also found were reports on the progress of the "Isolated Groups" of Jehovah's Witnesses at Dar-es-Salaam for periods

in 1966 and 1967 covered by the charges, which, together with the other books and documents referred to above, all purport to relate to the proscribed societies. The appellant's record card also indicates that the appellant's membership continued during the period covered by the charges. We are accordingly satisfied that the presumption created by the discovery of these books and documents in the appellant's possession can safely be applied retrospectively to cover the periods of time specified in the charges relating to membership.

As we have already noted, the fact that documents purport to relate to a society is not sufficient to raise the presumption of assisting in management created by sub-s. (2) of s. 23 of the Societies Ordinance. It is thus necessary, in the case of a charge laid under that subsection, for the prosecution to prove that the documents in fact relate to the proscribed society, if it is intended to rely on the presumption to prove the charge. In our view, the question whether the presumption applied in this particular case does not arise, as we consider the charge of assisting in management to have been established by direct evidence. Twelve publishers' cards were found in the appellant's possession, all bearing entries dated during the period covered by the charges, and nine of these were in the names of persons other than members of the appellant's family. One of these cards was identified by Mrs. Everett as being hers and it included an entry in her own handwriting. In addition Mrs. Everett deposed that on November 10, 1966, she was baptized as a member of Jehovah's Witnesses by the appellant. These matters satisfy us that the appellant was assisting in the management of the society known as Jehovah's Witnesses during the period covered by count 3, and that he was properly convicted of that offence.

This leaves for consideration only the third group of submissions relating to the failure of the trial magistrate to warn himself that Mrs. Everett was an accomplice and that her evidence required corroboration. This ground is only material if the magistrate relied on Mrs. Everett's evidence in convicting the appellant. He does not appear to have done so. As we read his judgment, it is based entirely on the discovery of the mass of literature found in the appellant's possession, that is to say on the presumptions created by s. 23. In so far as the magistrate may have been influenced by Mrs. Everett's evidence, it is clear that she was in law an accomplice, as she became a member of Jehovah's Witnesses after that society was declared to be unlawful on June 11, 1965, and was baptized as such on November 10, 1966. Her evidence was, however, corroborated by the discovery of her membership card in the appellant's possession in February, 1968, and we are satisfied that if the magistrate had given the matter consideration he must have come to the same conclusion.

It follows that in our opinion this appeal fails on all grounds and must be dismissed, and we order accordingly.

Appeal dismissed.

For the appellant:
AR Kapila and *RC Kesaria*
RC Kesaria, Dar-es-Salaam

For the respondent:
KRK Tampi and *Mrs PM Chirwa* (State Counsel, Tanzania)
Attorney-General Tanzania

Opoloto v Attorney-General
[1969] 1 EA 631 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	10 July 1969
Case Number:	18/1969 (107/69)
Before:	Sir Charles Newbold P, Duffus V-P and Law JA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda – Russell, J

[1] Civil Practice and Procedure – Declaratory action – Discretionary remedy – Grounds for exercising discretion – Not to be exercised if effect is to create a relationship having as its essence mutual confidence between persons – Nor if effect is seriously to embarrass and prejudice the security of the State.

[2] Constitutional Law – Prerogative powers – Power to dismiss officers, including military officers, at will – Whether power exercisable by President.

[3] Constitutional Law – Prerogative powers – Taken away or limited by statute – Clear words required.

[4] Statute – Construction – Armed Forces Act (*Cap.* 295) (*U.*) *– Clear words required to take away an established prerogative right vested in President.*

[5] Statute – Construction – Amendment of statute may be implied – Armed Forces Act (*Cap.* 295) (*U.*).

Editor's Summary

The appellant, who was formerly a Brigadier in the Uganda Army and Chief of the Defence Staff, was discharged from the army on October 7, 1966, and was detained under Emergency Regulations. He applied to the High Court for a declaration:

(*a*) that his discharge was invalid and that he was still a member of the Armed Forces and Chief of the Defence Staff;

(*b*) that the Armed Forces (Discharge) Regulations, 1966 were invalid.

The application was refused by the High Court and the appellant then appealed to the Court of Appeal.

Held –

(i) the Court has a very wide power to make a binding declaration of right, but it is a discretionary power and should be exercised only with care where the effect would be to create a relationship between persons which has an essential element of mutual confidence;

(ii) the discretion should not be exercised where the result would be seriously to embarrass and prejudice the security of the State;

(iii) the prerogative powers vested in the British Crown before the Independence of Uganda, including the power to dismiss at will officers in its service, are now vested in the President;

(iv) to take away this established prerogative right by statute would require clear words;

(v) references in the Armed Forces Act to "Prime Minister" are to be regarded as impliedly amended by the 1966 Constitution of Uganda, and the word "President" substituted.

Appeal dismissed with costs.

Cases referred to in judgment:

(1) *Terrell v. The Secretary of State for the Colonies*, [1953] 2 Q.B. 482.

(2) *Dunn v. The Queen*, [1896] 1 Q.B. 116.

Judgment

The following considered judgment of the court was read on behalf of **Sir Charles Newbold P:** On October 7, 1966, the appellant, Shabane Opoloto, who was a Brigadier in the Uganda Army and Chief of the Defence Staff, received a letter signed by "A. Milton Obote. Chairman, Defence Council" reading as follows:

> "I am to inform you of the decision of the Defence Council taken under section 1 (*b*) and (*g*) of the Armed Forces (Discharge) Regulations, 1966, that you be discharged from the Uganda Armed Forces with immediate effect.
>
> You will, on receipt of this letter hand over to Lt. Col. J. Musa and Lt. Col. Y. Omwoya, all official property in your possession."

On the same day the appellant was detained under Emergency Regulations and is, so far as is known, still so detained. In January, 1967, the appellant field a suit against the Attorney-General seeking a declaration:

(*a*) that his purported discharge from the Armed Forces "was invalid and of no legal effect, and that (he) is still a member of the Armed Forces and Chief of the Defence Staff;

(*b*) that the Armed Forces (Discharge) Regulations, 1966, are invalid and of no legal effect."

The trial judge dismissed the suit holding, first, that under s. 28 of the Interpretation Act the President of Uganda, whose commission as a Brigadier the appellant held, was empowered to discharge the appellant from the Uganda Army and had, in fact, done so by the letter above quoted; secondly, that the President of Uganda had the prerogative right to dismiss any officer of the Armed Forces at will and that this right had not been fettered by any legislation; thirdly, that the Armed Forces (Discharge) Regulations 1966 were not invalid and, it would seem, that the appellant was validly dismissed in accordance therewith; and, finally, that the right to a declaratory judgment was discretionary and that in the exercise of the discretion he did not consider this a case in which he would be justified in making the declaration sought. From that judgment the appellant has appealed and challenges the decision of the trial judge in all respects.

Under O. II, r. 7 of the Civil Procedure Rules the court may make a binding declaration of right whether or not any consequential relief is or could be claimed. This is a very wide power; but it is a discretionary power and one which should be exercised, if at all, only with the greatest caution where the declaration sought would have the result of creating a relationship between persons, which relationship has as an essential element mutual confidence. Further, the discretion to give a declaratory judgment is one which should never be exercised where the result of the declaration would be seriously to embarrass and prejudice the security of the State.

Under art. 24 of the present Constitution of Uganda the President of Uganda is the Head of State, Head of Government and Commander-in-Chief of the Armed Forces of Uganda. Under art. 65 the executive power of Uganda vests in the President and shall be exercised by him either directly or through officers subordinate to him. Under art. 78 the supreme command of the Armed Forces of Uganda vests in the President, a provision which includes power to determine

the operational use of the Armed Forces and to appoint and dismiss any member of the Armed Forces. It is quite clear that, so far as any individual can do so, the President is the embodiment of the State and that the Armed Forces exist for the preservation of the State from external aggression and, in the final resort, internal subversion. For these purposes the President must have the utmost confidence in the senior officers of the Armed Forces. What the appellant – a person in whom the President had so little confidence that, rightly or wrongly, he was discharged with immediate effect from the Armed Forces and detained immediately thereafter and remains so detained – asks is that he should be declared still a member of the Armed Forces and the Chief of the Defence Staff, an office of major importance to the security of the State. It is difficult to conceive of a declaration which in these circumstances would more seriously prejudice and embarrass the security of the State or one which it would be more inappropriate for a court to make, as it would create a relationship which must be founded on confidence when it is quite clear that no such confidence exists. Mr. Kiwanuka, apparently appreciating the difficulty of asking for any such declaration, changed the declaration sought to one that the appellant was still a member of the Armed Forces as a commissioned officer holding his substantive rank. The evidence shows that the appellant immediately before his discharge held the rank of Brigadier and so far as is known that is his substantive rank. That rank is either the most or one of the most senior ranks in the Uganda Army. For a court to declare that the appellant was in the circumstances one of the most senior officers of the Uganda Army would be open to precisely the same objections as to declare that he held the office of Chief of the Defence Staff.

For this reason, no matter what might be the position on the other points argued on the appeal, we consider that the trial judge was entirely correct in refusing to grant the declaration sought. This disposes of the appeal but as other important points were argued we shall briefly give our decision on them, such decision being equally a reason for dismissing the appeal.

It was urged that the trial judge was wrong in holding that the President had a prerogative right to dismiss any officer of the Armed Forces at will on the ground that no such prerogative right had devolved on the President on the attainment of Independence or, if it had, that the right had been fettered by legislative provisions. We do not agree. It is clear that prior to the Independence of Uganda the British Crown had the power to dismiss at will officers, including military officers, in its service whether in the United Kingdom or abroad, unless that right was fettered by statute (see *Terrell v. The Secretary of State for the Colonies*, [1953] 2 Q.B. 482 and *Dunn v. The Queen*, [1896] 1 Q.B. 116). Mr. Kiwanuka submitted that the Crown in respect of its officers serving in Uganda did not enjoy this prerogative right, but he referred to nothing in support of this submission. We are satisfied that immediately prior to Independence the Crown had a prerogative right to dismiss at will officers, both civil and military, in its service in Uganda, unless that right was fettered by statute. We are also satisfied that under s. 44 of the Constitution of Uganda (First Amendment) Act 1963 the prerogative powers of the Crown in this respect passed to the President and that on October 7, 1966, these prerogative powers were, by s. 131 of the 1966 Constitution, vested in the President of Uganda on that date. Thus, unless these powers were fettered by any legislation, we are satisfied that on October 7, 1966, the President was entitled to dismiss the appellant from his office of Chief of the Defence Staff and also from the Armed Forces. Mr. Kiwanuka, however, submits that the provisions of s. 96 of the Armed Forces Act, which provisions enable the Defence Council to make regulations for the discharge of officers and men of the Armed Forces, has fettered the prerogative right of the President to dismiss at will such officers and

men. We do not agree. It would require clear words to take away this established prerogative right. The mere provision in an Act enabling regulations to be made for the discharge of such persons would not have the effect of removing from the President the prerogative right to dismiss at will, though it might have the effect of providing an additional method of dismissal. We also agree with the trial judge that s. 28 of the Interpretation Act entitled the President to rescind any commission which may have been granted to the appellant and that nothing in the Armed Forces Act or in the Regulations made thereunder had placed any limitation on this power of rescission.

A much more difficult question is whether, by the letter above referred to, the President had, in fact, exercised the prerogative powers vested in him or the powers referred to in s. 28 of the Interpretation Act. Mr. Kiwanuka submitted that where powers are conferred on a person in a certain capacity he must act in that capacity for his action to be effective. We consider it may well be that a person who purports to act in one capacity cannot be said to have exercised powers vested in him in a completely different capacity. By the letter above referred to "A. Milton Obote", described as the Chairman, Defence Council, informed the appellant that the Defence Council had discharged him from the Armed Forces under the powers contained in the Armed Forces (Discharge) Regulations 1966. Can that be said to be an exercise by the President of Uganda of prerogative powers vested in him under the Constitution or of powers vested in him by reason of the Interpretation Act?

It is not in dispute that the person who signed the letter was the President of Uganda; but he purported to be notifying a decision taken not by the President but by the Defence Council and not under prerogative powers or powers contained by virtue of s. 28 of the Interpretation Act but under powers contained in the Armed Forces (Discharge) Regulations 1966. In the particular circumstances of this case it would be unreal to hold that the President of Uganda was not seeking to discharge the appellant by virtue of any and all of the powers he possessed. Nor is there any reason to consider that the appellant was in any way misled into thinking that the decision was not the decision of the President. Nevertheless, while a person may pray in aid powers which were not mentioned at the time an act was performed but which in fact existed in order to give effectiveness to the act, we find it difficult to say that an act purportedly done by a person in one capacity may be regarded as effectively done by that person in another capacity. Since we are dismissing the appeal on other grounds, we find it unnecessary to come to a definite conclusion on whether the appellant was dismissed from the office of Chief of the Defence Staff and discharged from the Armed Forces by the President by virtue of any prerogative power or any power arising by reason of s. 28 of the Interpretation Act.

Finally, Mr. Kiwanuka submitted that the appellant was not validly discharged from the Armed Forces under the Armed Forces (Discharge) Regulations 1966, because the Defence Council which made the Regulations and which took the decision to discharge the appellant was not properly constituted as its chairman consisted of the President and not, as required by s. 11 of the Armed Forces Act, of the Prime Minister. The trial judge rejected this submission and we agree with him. At the time the decision to make the Regulations and to discharge the appellant was taken, the office of Prime Minister no longer existed. It is clear from the 1966 Constitution that s. 11 of the Armed Forces Act was to be regarded as impliedly amended by substituting for the words "Prime Minister" the word "President". This implied amendment was not affected by the omission from the Constitution (Modification of Existing Law) Instrument 1966 of any specific amendment to s. 11. We consider that the Armed Forces (Discharge) Regulations 1966 were validly made by the Defence Council and that the appellant was validly discharged from the Armed Forces by the Defence Council

under those Regulations, whether or not he was also validly discharged by the President acting under any other powers. This being so, the appellant is not entitled to a declaration either that he is still a member of the Armed Forces as a commissioned officer holding his substantive rank or that the Armed Forces (Discharge) Regulations 1966 are invalid.

Appeal dismissed.

For the appellant:
BKM Kiwanuka
Kiwanuka & Co, Kampala

For the respondent:
PJN Mugerwa (Solicitor-General, Uganda) and *MB Matovu* (State Counsel, Uganda)
Attorney-General, Uganda

Wanderi v Republic
[1969] 1 EA 635 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	26 July 1968
Case Number:	87/1968 (109/69)
Before:	Farrell and Chanan Singh JJ
Sourced by:	LawAfrica

[1] Criminal Law – Trespass – Ingredients of offence – Trespass Act (*Cap.* 294) (*K.*).

[2] Criminal Law – Trespass – Order for possession of land – Whether order can be made after conviction under Trespass Act, s. 12 (*K.*).

[3] Criminal Practice and Procedure – Charge – Trespass – Charge should allege that trespass is without reasonable and probable cause.

Editor's Summary

The appellant was recorded as having pleaded guilty in July, 1967, to a charge of trespass. He was fined and ordered to vacate the land by October, 1967. He did not appeal. In November, 1967, the appellant was charged under s. 12 (1) of the Trespass Act with disobedience of the order of the court, and pleaded guilty. He was fined again and a further order made that he vacate the land. On appeal against the second sentence, no objection was made to the earlier charge being dealt with.

Held –

(i) the original charge was defective in omitting the allegations that the trespass was without reasonable and probable cause and without the consent of the occupier;

(ii) the first conviction was a nullity and must be quashed;

(iii) the proceedings based on non-compliance with the first order were also a nullity and must be quashed;

(iv) an order for possession can only be made upon a conviction under the Trespass Act, s. 3 or s. 4.

Appeal allowed.

No cases referred to in judgment

Judgment

Farrell J: read the following judgment of the court: The proceedings out of which this appeal arises reveal an unsatisfactory state of affairs. The story begins with a prosecution before the African court in July, 1967. According to the record of those proceedings the appellant pleaded

guilty to a charge of trespass. Whether he in fact did so is disputed before this court. However that may be, he was convicted, fined Shs. 30/- and ordered to vacate the land for good before October 31, 1967.

There was no appeal against that conviction, and on August 1, 1967, the Magistrate's Courts Act came into force, by which African courts were replaced by magistrates courts. There were certain transitional provisions under which undetermined appeals from African courts could be continued, but as there was no appeal in existence on the material date, it would appear that any right of appeal which the appellant may have had expired on July 31, 1967.

The appellant failed to vacate the land in accordance with the order of the African court, and on November 12, 1967, he was brought before the newly constituted magistrate's court, charged with an offence under s. 12 (1) of the Trespass Act for disobedience to the order of the African court, convicted on his own plea and fined Shs. 300/-. A further order was made to vacate the land by January 31, 1968.

After the conviction was entered in the magistrate's court, the appellant in mitigation, apparently for the first time, mentioned that he was buying the land and had paid Shs. 1,700/- towards the purchase price. This was not agreed by the complaintant, but the appellant stated that he had filed a civil case in the magistrate's court claiming Shs. 10,000/- as compensation for development and expenses incurred on the land.

Before this court the appellant purports to appeal against the decision of the magistrate's court, but he has filed two affidavits in support of a claim that he did not plead guilty before the African court, but on the contrary denied that he was a trespasser.

It is conceded by counsel for the appellant that the appeal is out of time and that no formal application has been made for leave to bring it at this late stage, but State Counsel does not object to this court dealing with the matter. In view of the pending proceedings in the civil court, we have after some hesitation come to the conclusion that in the interest of justice we should not only consider the formal appeal against the decision in the magistrate's court but should at the same time review the proceedings before the African court.

We should be disinclined to allow the clear record of the African court to be challenged by affidavits sworn and filed many months after the proceedings had been completed. We are fortunately relieved of any requirement to decide what the appellant said in answer to the plea by a consideration of the charge itself which, as State Counsel has very properly pointed out, was defective in omitting the words "without reasonable excuse" and "without the consent of the occupier thereof" which are necessary to constitute an offence under s. 3 (1) of the Act. The omission of such words might in certain circumstances be treated as an irregularity curable under s. 382 of the Criminal Procedure Code – as to which we express no opinion one way or the other – but in the circumstances of this case we think the omission was fatal, in view of the fact later disclosed that there was a civil dispute in respect of the land in question. That in our view is enough to vitiate all the proceedings which ensued upon the entry of the plea of guilty. We must accordingly quash the conviction and order of the African court and set aside the fine.

As the order was a nullity the whole of the proceedings in the magistrate's court which were based on non-compliance with the order were also a nullity, and in the same way we set aside the conviction and the fine of Shs. 300/- imposed by the magistrate. The fines or any part of them which may have been paid must be returned to the appellant.

The order made by the magistrate's court was in our view in any case ultra vires, even if the conviction had been valid, since such an order can only be made upon a conviction under s. 3 or s. 4 of the Act, and the conviction in that case was under s. 12.

In the result nothing remains of the proceedings before either of the two subordinate courts. We do not know who is in occupation of the land at this time. If the appellant is still there and he can be proved to be a trespasser, the trespass is a continuing one and the complainant is entitled to bring further proceedings of a criminal nature under s. 3 of the Act. That is for him to decide; so far as we are concerned, we do not order a retrial upon the original charge as that is by now stale and out of date.

The appeal is allowed with the consequences which we have indicated above.

Appeal allowed.

For the appellant:
HS Daine
Daine & Wariithi, Nairobi

For the respondent:
JR Hobbs (Deputy Public Prosecutor, Kenya)
Attorney-General, Kenya

Re Kenya National Union of Teachers
[1969] 1 EA 637 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	7 May 1969
Case Number:	5/1969 (110/69)
Before:	Mwendwa CJ and Farrell J
Sourced by:	LawAfrica

[1] Jurisdiction – Industrial Court – Dispute – Industrial Court has jurisdiction to hear a dispute referred to it jointly by the Teachers Service Commission and National Union of Teachers in respect of an order of suspension imposed on a teacher by the Commission.

[2] Master and Servant – Trade Dispute – Complaint against an order of suspension of a single employee constitutes a "dispute" – Trade Disputes Act (*Cap*. 234), *s*. 2 (*K*.).

[3] Master and Servant – Trade Dispute – Trade Disputes Act applies to Government.

Editor's Summary

Arising out of some unrest in the Mary Leakey High School during February, 1968, the Teachers' Service Commission on March 12, 1968, interdicted a teacher from duty and on April 23 suspended this teacher from service without pay for a period of three months and cancelled the order of interdiction. The teacher complained to the Kenya National Union of Teachers, which reported a trade dispute to the Minister of Labour. The Minister appointed an investigator under s. 7 of the Trade Disputes Act. The investigator, in his report to the Commission and the Union, recommended that the suspension of the teacher be withdrawn. On August 16 the Commission considered the recommendation, but refused to alter its decision of suspension and on October 10 the Union was informed. In November the Commission and the Union notified the Industrial Court under s. 9 (4) of the Trade Disputes Act of the existence of a trade dispute stated to be:

> "the refusal of the Teachers Service Commission to accept the Minister of Labour's recommendation which states: 'that the Teachers Service

Commission should reconsider the suspension of the teacher with a view to with drawing it unconditionally'."

Before the Industrial Court, counsel for the Commission took as a preliminary point that the Industrial Court had no jurisdiction. The Industrial Court adjourned to enable an application to be made to the High Court for an order of Prohibition. Before the High Court it was contended: (i) the matter in dispute was not a "trade dispute" within the meaning of the Trade Disputes Act, and the Industrial Court accordingly had no jurisdiction; (ii) the Commission had sole authority to determine the matter in dispute without reference to any other body including the Industrial Court.

Held –

(i) (*a*) there was a "trade dispute" as defined in s. 2 of the Trade Disputes Act, even although there was only one employee aggrieved;

(*b*) the Union was properly made a party to the reference to the Industrial Court;

(ii) there is nothing in the Teachers Service Commission Act which modifies or limits the application of the Trade Disputes Act so as to prevent the Industrial Court hearing and determining the dispute;

(iii) the true issue before the Industrial Court was whether the suspension of the teacher should be carried into effect.

Application dismissed with costs.

Cases referred to in judgment:

(1) *R. v. National Arbitration Tribunal, ex parte South Shields Corporation*, [1952] 1 K.B. 46.

(2) *R. v. Industrial Disputes Tribunal, ex parte Queen Mary's College, University of London*, [1957] 2 All E.R. 776.

(3) *Beetham v. Trinidad Cement Limited*, [1960] A.C. 132.

Judgment

Mwendwa CJ: delivered the following order of the court: This is an application by the Attorney-General on behalf of the Teachers' Service Commission (to which we shall refer as "the commission") for an order of prohibition directed to the Industrial Court to prohibit that court from inquiring into a dispute jointly referred to it by the commission and the National Union of Teachers (to which we shall refer as "the union") under the provisions of the Trade Disputes Act.

We will first summarize the facts out of which the application arises. In February, 1968, there was some unrest among the students of the Mary Leakey High School, at which Miss Kehato was a teacher. The unrest culminated in a strike on the last day of February, and for reasons with which we are not directly concerned Miss Kehato together with some of her colleagues absented herself from duty the next day. On March 12 Miss Kehato, who was suspected of having been concerned in the disturbances, was interdicted from duty by the commission on the grounds of "failure to conduct herself well as a teacher by being disobedient to the instructions given to her by the head-mistress". After she had submitted an explanation of her conduct and had appeared before the commission, the commission on April 23

revoked the interdiction and suspended her from service without pay for a period of three months.

Miss Kehato who was a union member complained to the union and the union in turn reported a trade dispute to the Minister, who appointed an investigator under powers conferred by s. 7 of the Trade Disputes Act. The investigator drew up a report and submitted it to the commission and to the union. In it he recommended that the commission should withdraw the suspension of Miss Kehato unconditionally, should give her a warning and transfer

her to another school. The commission met on August 16 to consider the report, and decided that the decision previously taken should stand. This decision appears not to have been conveyed to the union until October 14. Discussions appear to have continued between the commission and the union, and some time in November the commission and the union jointly notified the Industrial Court under s. 9 (4) of the Trade Disputes Act of the existence of a trade dispute, and specified the issues in dispute as:

> "the refusal of the Teachers Service Commission to accept the Minister of Labour's recommendation which states: 'that the Teachers Service Commission should reconsider the suspension of Miss Kehato with a view to withdrawing it unconditionally."

On receipt of the notification the court, as it is required to do under s. 9 (4) of the Act, took cognizance of the dispute, and fixed a date for the hearing. When the case was called counsel for the commission objected that the Industrial Court had no jurisdiction to inquire into the dispute, and the court adjourned the hearing and gave time for application to be made to this court for an order of prohibition.

The grounds on which the application is made are:

(*a*) that the matter of dispute is not a trade dispute within the meaning of the Trade Disputes Act, and

(*b*) that the Teachers Service Commission is solely entrusted by Parliament to determine the matters the subject of the dispute without reference to the Industrial Court or any other body.

The first issue, accordingly, for our determination is whether the dispute falls fairly within the ambit of the Trade Disputes Act so as to give the Industrial Court jurisdiction. If it does not, the application must succeed. If, on the other hand, it appears that the Trade Disputes Act *prima facie* applies, the second issue arises whether there is anything in the Teachers' Service Commission Act which is inconsistent with the Trade Disputes Act, so as to modify the earlier Act or limit its application in any way so as to preclude its operation in respect to any dispute between the commission as employer and a teacher as employee.

Before proceeding to consider these issues we think it desirable to mention certain collateral questions which have been touched on in these proceedings but in our view are of no direct concern to us. First of all, we are not called upon to express any view on the merits of the case against Miss Kehato or on the appropriateness or otherwise of the punishment imposed on her by the commission in the exercise of its disciplinary functions. Nor are we concerned with the extent or basis of the powers conferred on the commission as disciplinary authority since it is acknowledged in paragraph 9 of the affidavit on behalf of the union that the commission as employer had authority in appropriate cases to suspend a teacher. In so far as complaint is made that the commission did not follow the correct procedure laid down in the regulations, as alleged by the investigator appointed by the Minister, this again is not a matter with which we are concerned. If the commission acted outside its jurisdiction or in an irregular manner, that might have been the subject of other proceedings against the commission, but cannot be an issue in these proceedings on an application for an order of prohibition directed to the Industrial Court. Nor are we concerned with an allegation that the Permanent Secretary acted without authority in purporting to interdict the teacher on the day before the interdiction was imposed by the commission (see paragraphs 8 and 9 of the union's affidavit) since, whether or not this was so, the effective interdiction was that imposed by the

commission, and that was the interdiction leading to Miss Kehato's suspension from duty which was the subject matter of the dispute referred to the Industrial Court.

Having cleared these matters out of the way we proceed to the first issue, whether there was a trade dispute within the meaning of the Act. The definition of "trade dispute" is found in s. 2 and reads:

> "'trade dispute' means any dispute or difference between employers and employees, or between employees and employers connected with the employment or non-employment, or with the terms of employment, or with the conditions of labour of any person, and includes an apprehended trade dispute."

The definition originated in the English Trade Disputes Act 1906 and has been adopted with only minor differences (at any rate so far as the present case is concerned) in most subsequent legislation on the subject.

In the course of the argument the court of its own motion raised two questions, which proved to be interconnected; the first, whether there can be a trade dispute within the definition where only one employee is aggrieved; the second, whether the union was properly made a party to the reference to the Industrial Court. The first point has been considered in two English cases, neither of which was brought to our notice by counsel. In *R. v. National Arbitration Tribunal, ex parte South Shields Corporation*, [1952] 1 K.B. 46, a Divisional Court decided that for the purpose of the definition in the Industrial Disputes Order 1951 there must be a dispute between the employer and more than one workman in his employ. The decision was to some extent based on the wording of the definition, in which "employer" appeared in the singular whereas "workmen" was in the plural. The decision was not followed in *R. v. Industrial Disputes Tribunal ex parte Queen Mary's College, University of London*, [1957] 2 All E.R. 776, where a court consisting of Lord Goddard, C.J. (who had delivered the judgment in the *South Shields* case) and Devlin, J., held that there was a dispute within the definition, because the body of workmen, members of the union, had taken up the dispute, and although the dispute referred to the tribunal related to the upgrading of only one workman, yet it was a dispute "connected with . . . the conditions of labour of any of those workmen" within the definition. Towards the end of the judgment of the court at p. 782, Devlin, J., said:

> "We think that in this case there is a dispute, although it is of a somewhat narrow character. The dispute is merely whether Mr. C. should be upgraded immediately or whether his claim to be up-graded should, if one may so put it, await favourable consideration in, or sometime before, September next. One can hardly suppose that the union would have taken such a matter up and referred it to the tribunal unless there had been some general principle, as they think, lying behind it; and narrow though the matter is, it is a dispute."

Similar questions arose for consideration in *Beetham v. Trinidad Cement Limited*, [1960] A.C. 133, on appeal to the Privy Council from the Supreme Court of Trinidad and Tobago, where in the course of the judgment of the Judicial Committee Lord Denning, M.R., at p. 144 referring to a contention that the difference was not one between the company and the workmen, but only a difference between the company and the union, cited a dictum of Lord Wright in a case decided in the House of Lords in 1943:

> "It would be strangely out of date to hold, as was argued, that a trade union cannot act on behalf of its members in a trade dispute or that a

difference between a trade union acting for its members and their employer cannot be a trade dispute."

In the light of the authorities to which we have referred we are satisfied that neither the fact that the terms of employment of only one teacher were under consideration nor the fact that the union purported to be a party to the dispute was sufficient to prevent the difference amounting to a trade dispute.

Nor, indeed, is it easy to find any other ground within the four walls of the Trade Disputes Act which would take the present dispute outside the definition. It is conceded by State Counsel that "employer" includes the Government or any public or local government authority, that a teacher is an employee and that the definition of "trade dispute" is very wide. In accepting the onus of showing either that there is no trade dispute or that the provisions of the Teachers' Service Act preclude any reference to the Industrial Court, it seems to us that he has concentrated on the second limb of his argument, and that he has been unable to show anything in the Trade Disputes Act which would in any way preclude the Industrial Court from taking cognizance of the dispute.

We turn now to the second ground, on which counsel for the applicant more strenuously relies, that as Parliament has solely entrusted to the commission the determination of matters in dispute in relation to teachers' discipline, the commission has no power to delegate the performance of its statutory duties to any other body as it purported to do in agreeing to the reference to the Industrial Court. If that is so, the reference was a nullity and incapable of conferring jurisdiction on the court.

We have been referred to a number of authorities by counsel on both sides on the subject of the delegation of statutory powers. With respect, we do not find it necessary to discuss those authorities in any detail since we are satisfied that there was here no delegation in any true sense of the term. We think some confusion has not unnaturally arisen from the dual functions assigned to the commission by the Teachers Service Commission Act. As we have already mentioned, it is common ground that under the Act the commission is both the employer of the teachers and the body entrusted with disciplinary authority over them. In coming to the conclusion that Miss Kehato was guilty of misconduct and in imposing the punishment of three months' suspension the Commission was merely carrying out the duties imposed on it by the Act. Having come to that conclusion, the Committee was in our view functus officio. No appeal lay from its decision, and while it was open to it, if it thought fit, to reconsider the decision, it could not be compelled to do so. As a body exercising quasi-judicial functions, it had completed its task.

But that does not, we think, in any way preclude the possibility of "a dispute or difference" arising in terms of the Trade Disputes Act. Nothing can prevent a teacher who has been disciplined from feeling aggrieved if she is so minded, and manifestly the union is entitled, if it thinks fit, to take up her grievance with the employer. But the dispute or difference is then not with the commission in its quasi-judicial capacity but in its capacity as an employer. It seems to us that once the commission in its quasi-judicial capacity as a disciplinary authority has given its decision in favour of suspension, then in its executive capacity qua employer it has a legal right to carry out the decision or not just as in the *South Shields* case the employer had a legal right either to up-grade the employee or to keep him in his existing grade. Thereafter as between the commission and the union the dispute was a matter of negotiation as to the practical steps to be taken with regard to the teacher's future employment. When the union on behalf of its member protested against the penalty of three months' suspension, it was not so much challenging the decision of the disciplinary authority as

representing that in the interests of employer-employee relations it was inexpedient that the decision should be carried out. And when the commission agreed to refer the matter to the Industrial Court, it does not seem to us that it was in any way delegating to the Industrial Court the exercise of the quasi-judicial functions imposed on it by Parliament, but it was rather leaving to the decision of that court, as Parliament intended when it enacted the Trade Disputes Act, the decision of the practical question as to the manner in which the teacher as employee should be treated by itself as employer.

We think that the position can be clarified by considering what might happen if a teacher were dismissed (or, in terms of the Teachers Service Commission Act, had his name removed from the register). We will suppose that the case of the teacher had been properly considered by the commission under s. 9 of the Act, and that the teacher had appealed unsuccessfully under s. 11. In such a case the union might very well take up the case of the dismissed teacher, and make the strongest representations against his dismissal. If the commission stood firm, and the union and its members felt sufficiently strongly about it, strike action might be threatened. Could it then be said that there was no trade dispute within the meaning of the Trade Disputes Act? Could it be said that the methods of conciliation provided for under the Trades Disputes Act were ruled out by reason of the provisions of the Teachers Service Commission Act? And if, in the last resort a joint application were made or the dispute were referred to the Industrial Court under s. 9 (4) of the Act, would it be right for this court to issue an order of prohibition to the Industrial Court enjoining it against taking cognizance of the dispute?

If an affirmative answer were to be given to these questions, it seems to us that the implication would be that in relation to the employment of teachers the Trade Disputes Act has no application. Before we could reach such a conclusion we think we should have to look for some very clear indication that such was the intention of Parliament. In the Trade Disputes Act itself we can find no such indication. We find that “employer” is defined to include the government and “employee” to include government servants.

Moreover, we find in s. 3 a description of persons to whom the Act does not apply. This section reads:

> “This Act shall not apply to any person in respect of his employment or service –
>
> (*a*) in the armed forces, or in any reserve force thereof;
>
> (*b*) in a police force, administrative police force, or prison service, or in the National Youth Service, or in any reserve force or service thereof.”

If it had been intended that the Act should not apply in respect of the employment of teachers it would have been easy to say so. From the silence of the section we infer that the Act was intended to apply to teachers.

From the Trade Disputes Act we turn to examine the Teachers Service Commission Act. We have already considered the relevant provisions of that Act. Certainly it contains no specific provisions precluding the application to teachers of the provisions of the Trade Disputes Act. Nor have we found any provision which by clear implication has such an effect. If the provisions of the later Act were manifestly inconsistent with the earlier, then on general principles of construction we should be obliged to treat the earlier as pro tanto repealed by the later. But we have indicated the manner in which, so it seems to us, the provisions of the two enactments can stand side by side without contradiction, as long as the dual functions of the commission established by the later enactment are kept distinct. Provided that this is done, we see no necessary conflict between

the provisions of the two Acts, nor do we find it necessary to hold that by taking cognizance of the present dispute the Industrial Court would in any way be usurping the functions imposed by Parliament on the Teachers' Service Commission.

There is only one further point which we think it right to mention. In the light of the views which we have endeavoured to express, we think that the "issues in dispute" as set out in the joint reference to the Industrial Court were not very happily framed, due to a not unnatural failure to take account of the dual functions of the commission. The true issue as we see it is whether the suspension of Miss Kehato (with its consequential deprivation of three month's salary) should be carried into effect. We have no doubt that this was what the parties intended, and we see no reason why the reference should not be so construed. The issue, is, of course, a narrow one, as was the issue in the *South Shields* case. But as was said in the *South Shields* case, "narrow though the matter is, it is a dispute".

For the reasons we have given, the application is dismissed with costs.

Application dismissed.

For the applicant:
Attorney-General, Kenya

For the respondent:
SM Otieno, Nairobi

Kagane and others v Attorney-General and another
[1969] 1 EA 643 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	12 January 1968
Case Number:	1334/1966 (111/69)
Before:	Rudd J
Sourced by:	LawAfrica

[1] Malicious prosecution – Reasonable and probable cause – Fact that prosecution advised by State Counsel not by itself reasonable and probable cause.

[2] Malicious prosecution – Reasonable and probable cause – Test of reasonable and probable cause objective – Subjective test only applied when direct evidence exists to show prosecutor did not believe his case.

[3] Malicious prosecution – Reasonable and probable cause – Whether belief of prosecutor in guilt of accused should be examined.

Editor's Summary

The plaintiffs, three serving police officers, were charged with conspiracy to accuse falsely of a crime and with conspiracy to pervert the cause of justice. All were acquitted, and they thereafter brought this action against the Attorney-General and the police officer who caused their prosecution, claiming damages for malicious prosecution and false arrest. The facts appear fully in the judgment.

Held –

(i) whether there was reasonable and probable cause for the prosecution is primarily to be judged on the objective basis of whether the material known to the prosecutor would satisfy a prudent and cautious man that the accused was probably guilty (*Hicks v. Faulkner* (1) adopted);

(ii) the fact that the prosecution was instituted on the advice of State Counsel did not if itself constitute reasonable and probable cause. The material must be fairly put to counsel and the prosecutor must still believe in his case;

(iii) once the objective test is satisfied, it may be necessary to consider whether the prosecutor did not honestly believe in the guilt of the accused; but this subjective test should be applied only where there is evidence directly tending to show that the prosecutor did not believe in the truth of his case (*Glinski v. McIver* (3) adopted);

(iv) on the facts, no reasonable person could honestly have believed that the prosecution was at all likely to succeed; and the second defendant was actuated by malice.

Judgment for the plaintiffs.

Cases referred to in judgment:

(1) *Hicks v. Faulkner* (1878), 8 Q.B.D. 167.

(2) *Herniman v. Smith*, [1938] A.C. 305.

(3) *Glinski v. McIver*, [1962] A.C. 726.

(4) *Revenga v. Mackintosh* (1824), 107 E.R. 541.

(5) *Bradshaw v. Waterlow & Sons*, [1915] 3 K.B. 527.

(6) *Lister v. Perryman*, [1870] L.R. 4 H.L. 521.

Judgment

Rudd J: This is an action by three police officers for damages for malicious prosecution and false arrest. The plaintiffs formed the complement of a 999 police patrol car, and in the early hours of the morning of March 14, 1966, some wheels were stolen in the Watkins Street area from motor cars belonging to a Mr. Tosar and a Mr. Vadher. Another wheel was stolen in the same area from a motor car belonging to a Mr. Kartar Singh. The plaintiffs were patrolling the area in connection with this last mentioned theft, and they arrested an African called Mutiso Mutua and recovered a wheel which had been stolen from Tosar's car. They each made statements with a view to the prosecution of Mutiso Mutua in connection with this wheel. Their statements were consistent and to the effect that they came upon Mutiso Mutua carrying the wheel near the junction of Sandeford Street and Hamilton Street. They alleged that he dropped the wheel there and ran away down Sandeford Street and was arrested after a chase, the wheel being recovered near where it had been dropped. Later in the same night the plaintiffs arrested another African called Mwanthe Kingola and brought two more wheels to the police station. One of these had been stolen from Vadher's car. The plaintiffs made statements with a view to the prosecution of Mwanthe Kingola. Their statements were consistent to the effect that they found Mwanthe Kingola covering up these wheels with grass in a grassy part of the old Nairobi racecourse near the junction of Watkins Street and Hamilton Street.

Over a month after these events the defendant King obtained statements from Tosar, Vadher and other Indians to the effect that the Indians had discovered all three wheels and that no stray African was near at the time any of these wheels were found. They said the first wheel was found in the old Racecourse, near

the place where the other two wheels were later found and not near the junction of Sandeford Street and Hamilton Street, and one of the Indians stated that Mwanthe Kingola was arrested on the roadside and was not found together with the other two wheels. Although these late statements by the Indians were far from consistent and in some important respects conflicted with the earlier statements which had been made by some of the Indians soon after the events

occurred the plaintiffs were prosecuted on the basis that the later Indians' statements were true and that the plaintiffs' statements were false and must have been concocted by the plaintiffs in conspiracy with each other.

The plaintiffs were prosecuted on six counts.

Count one charged conspiracy to accuse falsely of a crime contrary to s. 117 (*a*) of the Penal Code, by conspiring falsely to accuse Mutiso Mutua of stealing the first wheel.

Count two was a similar count alleging a similar conspiracy against Mwanthe Kingola in relation to the other two wheels.

Count three was an alternative count to the first count, and alleged conspiracy to pervert the cause of justice by making or causing to be made divers written statements which alleged falsely that Mutiso Mutua was in possession of the first wheel on the morning in question.

Count four was an alternative count to count two and alleged a similar conspiracy against Mwanthe Kingola in relation to the other two wheels.

Count five was in the further alternative to counts one and three, and charged conspiracy to commit a misdemeanour by conspiring with intent to mislead the Resident Magistrate's court by making or causing to be made divers written statements which falsely alleged that Mutiso Mutua was in possession of the first wheel.

Count six was a similar count to count five in the further alternative to counts two and four in relation to Mwanthe Kingola and the other two wheels.

The plaintiffs were acquitted on all six counts. The court of trial found that their statements and evidence were true in fact.

The prosecution was instituted by King on the basis of an investigation conducted by him and was instituted pursuant to a direction by a State Counsel in the Attorney-General's Office, given after meetings and discussions with King and perusal of material collected by King. King was a police officer in the Criminal Investigation Department. The Attorney-General is also sued representing the State which was King's employer.

In order to succeed in the action for malicious prosecution the plaintiffs must prove four essential ingredients:

(1) That the prosecution was instituted by King. This is admitted.

(2) That the prosecution terminated in the plaintiffs' favour. This is also admitted, and in fact the plaintiffs were completely exonerated as well as being acquitted. I think, however, that there was still remaining a feeling on the part of the State Counsel that in fact the plaintiffs should not have been exonerated and that they were in fact guilty. As regards this I wish to say, as I can, that I have no doubt but that the plaintiffs were in truth and in fact innocent.

(3) The plaintiffs must also prove that the prosecution was instituted without reasonable and probable cause. This is a matter which requires very careful consideration as regards two aspects; the first aspect being as to whether the evidential material on which the prosecution was based was such that a reasonable prudent and cautious man could have honestly believed that it was sufficiently credible and cogent to justify the institution of a prosecution; and the second aspect being the effect of the fact that the prosecution was instituted on the direction of a State Counsel in the Attorney-General's Chambers.

(4) The plaintiffs have further to prove that the prosecution was instituted

> with malice on the part of the prosecutor King. In this connection malice means that the prosecution was motivated by something more than a sincere desire to vindicate justice.

As regards malice and want of reasonable and probable cause, in the nature of things, a person who is actuated by malice may for that reason be likely to institute a prosecution without reasonable and probable cause. This possibility is provided for in law to some extent in a rather backhanded way by allowing want of reasonable and probable cause to be taken into consideration as being some evidence of malice, but the converse does not apply. There would be too much risk of injustice if the converse applied since a malicious person may yet have reasonable and probable cause for instituting a prosecution, and so malice is no evidence at all of absence of reasonable and probable cause and must be completely disregarded when considering the question as to whether there was reasonable and probable cause for the prosecution.

> "Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed."

Per Hawkins. J., in *Hicks v. Faulkner* (1878), 8 Q.B.D. 167 at p. 171, approved in *Herniman v. Smith*, [1938] A.C. 305.

Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was so fabricated or not, the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test. That is to say, to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and insofar as that material is based upon information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution.

In England in a trial by judge and jury this objective test has to be decided by the judge alone. If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established.

If on the other hand the judge considers that *prima facie* there was enough to justify a belief in an ordinary reasonable prudent and cautious man that the accused was probably guilty then although this would amount to what I call primary reasonable and probable cause the judge may have to consider the further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judged by a subjective test. This subjective test should only be applied where there is some evidence that the prosecutor himself did not honestly believe in the truth of the prosecution. And where this test is applicable in a trial by judge and jury the judge should take the opinion of the jury as to whether the prosecutor did or did not honestly believe in the probable guilt of the accused. Inasmuch as this subjective test only comes into operation when there were circumstances

in the knowledge of the prosecutor capable of amounting to reasonable and probable cause, the subjective test does not arise where the reason alleged as showing absence of reasonable and probable cause is merely the flimsiness of the prosecution case or the inherent unreliability of the information on which that case was based, because this is a matter for the judge alone when applying the objective test of the reasonable prudent and cautious man. Consequently, the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe in the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example a failure or reluctance to bring it to trial, a statement that he did not believe in it and, I think possibly, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based.

I rely for what I have said as regards the nature and application of these tests upon the judgments of the House of Lords in *Glinski v. Mclver*, [1962] A.C. 726. That was a case which in effect decided that where the evidence showed circumstances capable of amounting to what I call primary reasonable and probable cause, as judged by the objective test, and the judge should not have left the question to the jury as to whether the defendant in fact did not believe in the truth of his case where there was no direct evidence to that effect.

There are cases in the books in which dicta are to be found which suggest that where the prosecutor instituted the prosecution on the advice of competent counsel or another person who appeared to be competent to give advice upon the matter, then a prosecution bona fide instituted on such an advice can be considered to have been instituted with reasonable and probable cause. I say dicta because I know of no case in the books in which there was said to have been reasonable and probable cause for the prosecution on that basis alone in which the evidence did not disclose facts amounting to primary reasonable and probable cause when judged on the basis of the ordinary reasonable prudent and cautious man. For myself I am not inclined to give much weight to the fact that the prosecutor acted on the advice of counsel.

In a borderline case it could well swing the balance; and I do not say that it is not material. It is not to be expected that an independent competent adviser would advise a prosecution unless he had before him facts which constituted primary reasonable and probable cause, but in my view that matter has to be judged on the objective test and the requirement of the satisfaction of the reasonable prudent and cautious man as regards the facts so far as they were known. If it is a question, however, of whether the facts, so far as they were known, could in law constitute an offence, then the opinion of the counsel becomes very material indeed. Lord Devlin referred to this in his judgment in *Glinski v. Mclver*.

A person, such for instance as Mr. Oswald, the chief police officer in this case, who had not himself fully investigated the case could well be excused for consenting to the prosecution when directed so to do by State Counsel acting on behalf of the Attorney-General. This, however, does not apply to the defendant, King, who himself conducted virtually the whole investigation and was instrumental in getting the direction of State Counsel for the prosecution to be instituted. Nor, indeed, would it exonerate State Counsel, who gave such a direction in the absence of reasonable and probable cause, although State Counsel would escape pecuniary liability if he was not actuated by malice.

However, the dicta to which I have referred are fairly carefully framed. The material must be fairly put up to counsel or other professional advisor involved. The prosecutor must still believe in his case.

It is interesting to note that the classic dictum is that of Bayley, J., in *Revenga v. Mackintosh* (1824), 107 E.R. 541, and that was a case in which damages were awarded against the defendant notwithstanding the fact that he had obtained the advice of counsel before procuring an order for the plaintiffs' arrest.

As far as I am concerned, except as regards a matter of law, the fact that the prosecution was instituted on the advice of counsel or by direction of the Attorney-General or State Counsel, is by no means conclusive to show the presence of reasonable and probable cause. In such a case the matter is to be judged by the test of the ordinary reasonable, prudent and cautious man, and while the effect of such advice or direction should perhaps make one slow to find absence of reasonable and probable cause it is no defence if the judge is satisfied that in fact no reasonable prudent and cautious man should have been satisfied that there was a good cause to put before the court with a reasonable probability of success. In *Bradshaw v. Waterlow & Sons*, [1915] 3 K.B. 527 there was primary reasonable and probable cause.

Before leaving the legal aspect of reasonable and probable cause I would say it is sufficient to constitute primary reasonable and probable cause if the prosecutor proceeds on such information as a prudent and cautious man may reasonably accept in the ordinary affairs of life. (*Lister v. Perryman* (1870), L.R. 4 H.L. 521). Per contra, if the information is not such that a prudent and cautious man might reasonably accept it in the ordinary affairs of life then such information would not constitute reasonable and probable cause for the prosecution.

In deciding whether a defendant in such an action had reasonable and probable cause for the prosecution the material time is of course the time when he instituted the prosecution. As regards a prosecution instituted pursuant to a fiat by the Attorney-General or a direction by State Counsel, I am sure that this cannot be a defence if there was no reasonable and probable cause for the prosecution.

Having discussed the principles to be applied to the decision of the issue as to reasonable and probable cause, I now turn to the consideration of the material upon which the prosecution purported to be instituted. I have been through the files of the statements over and over again, and if I were to point out every inconsistency in the various statements which were relied upon as forming the reason for bringing the prosecution it would take me a very long time to do so. I think it will be sufficient for the purpose to deal with this matter in outline rather than in meticulous detail.

On the night of March 13/14 the plaintiffs, having complied with the direction to visit Mr. Kartar Singh's house, patrolled the environs of Watkins Street. In the course of this patrol they arrested an African called Mutiso Mutua and found one motor car wheel which was later identified by Mr. N. D. Tosar as having been stolen from his car. At this time the plaintiffs were investigating a reported theft of a wheel from Mr. Kartar Singh's car. The plaintiffs met some other Indians in the area of their patrol and they reported that thefts had been committed in respect of wheels which had been on their cars. The plaintiffs brought Mutiso Mutua and the wheel which they had found to Mr. Kartar Singh for inspection, but he could not identify either the wheel or Mutiso Mutua. The plaintiffs then proceeded to Eastleigh Police Station where they left Mutiso Mutua and the wheel in charge. Up to this moment they had only arrested one man and only taken possession of one wheel, which I shall call the first wheel.

While they were in the police station dealing with Mutiso Mutua and the first wheel, two of the Indians whom they had met arrived at the police station and made a report. The plaintiffs and a member of the police station staff said that the nature of the report was that there were still Africans in the Watkins Street

area. As a result of this report the plaintiffs followed the car belonging to the Indians to a place in the old Racecourse near the junction of Watkins Street and Hamilton Street. The plaintiffs say that both the Indians went in their car to that place. It must have been perfectly clear that Mutiso Mutua and the first wheel had been left at the police station. The plaintiffs returned to the police station with two other motor car wheels and another African whom they had arrested called Mwanthe Kingola. One of these two wheels was identified as having been stolen from a Mr. Vadher's car. These facts must have been quite clear to anyone who made a reasonably careful scrutiny of the statements in possession of the defendant, King.

Mutiso Mutua, on being charged and cautioned, unequivocally admitted that he had stolen the first wheel. The plaintiffs' statements in relation to the finding of the first wheel and the arrest of Mutiso Mutua were to the following effect:

They said they drove down Watkins Street towards its junction with Hamilton Street and then turning to their left proceeded down Hamilton Street until they came near its junction with Sandeford Street, where they saw three Africans coming from the Digo direction, and that one of these Africans was carrying a motor car wheel. They said they called upon these Africans to halt and that they all ran away; that the man with the wheel dropped it near the roadside and ran down Sandeford Street; that the first two plaintiffs chased this man down Sandeford Street, leaving the third plaintiff to collect the wheel which he had dropped. They said that the man they were chasing turned to his right down a track off Sandeford Street and that they arrested him in a shamba on the left of that track. They said that they saw no Indians at this time or at the time when the first wheel was recovered from where it had been dropped, although later they did see Indians who reported thefts from their cars.

On the morning of March 14, which of course was the very date the offence was committed, two of the Indians made statements to the police; and neither of them said that any of the Indians recovered any wheels or were present when any wheels were recovered. One of these Indians said that the Indians searched the area but did not recover anything, his words being, "We went all round but we did not recover anything." He added, "The 999 police went to the grass and recovered two wheels and brought the tyres to me. I identified one as mine."

Four days later another Indian made a statement to the police in which he said that he remained at his house fitting a spare wheel on to his motor car up to the time the police came to him with some of his neighbours and the first wheel. He did not suggest that any of the Indians had found any of the wheels. I mention this because in a statement made much later some of the Indians said that this man had joined others in a search which they made before the first wheel was found. This was clearly untrue.

In relation to the finding of the first wheel it is important to know the layout of the roads in question. Sandeford Street runs parallel with Watkins Street and joins Hamilton Street about 150 yards, according to the map which I consulted, from its junction with Watkins Street. The old racecourse is on the other side of the line of Watkins Street more or less vertically opposite the angle formed by Watkins Street and Hamilton Street.

Now the plaintiffs said that they arrested Mutiso Mutua on the far side of Sandeford Street from Watkins Street and therefore some distance away from the old racecourse. They also said that the first wheel was recovered near the edge of the road and near the junction of Sandeford Street and Hamilton Street and therefore not in the old racecourse, but they said that no Indians were then present.

In statements made over five weeks after the events the Indian witnesses made

statements in which they said that the first wheel was found by them in the old racecourse and that later the two other wheels were found by them in the absence of the police in the old racecourse fairly close to where the first wheel was found. These statements, however, did not agree with the statement of one of the Indians made on the very day of the event. None of the Indians who made the statements on or close to the day of the event in any way suggested in those statements that any of the Indians had been instrumental in finding any of the wheels. This major discrepancy has never been explained. A study of the Indians' later statements shows them to be widely discrepant in detail. In describing the searches they made some of them said that certain persons took part in searches which those persons say they did not take part in. One of them said that all three wheels were found by Indians alone and taken to their compound and there handed over to the police. This is not true. Three wheels were never together in the compound. The first wheel was taken to the police station with Mutiso Mutua before the police returned to Watkins Street and obtained possession of the other two wheels.

Again, one of the Indians said that two civilian Africans were together in the police car. These must have been Mutiso Mutua and Mwanthe Kingola, but Mutiso Mutua was in the police station when Mwanthe Kingola was arrested.

Others of the late Indians' statements said that the two wheels were taken to the Indians' compound before the 999 car returned from the police station and were there handed to the plaintiffs. Yet the statement made by one of the Indians on the very day of the event said that the 999 police went into the grass and recovered the two wheels. This discrepancy has never been explained. There were other discrepancies in the late Indians' statements too numerous to mention in detail. The Indians' statements alleged that they reported the recovery of the two wheels at the police station. This is not borne out by the statement of the station staff on duty at the time. The Indians' statements alleged that one of the Indians travelled in the 999 car when it was following the Indian's car away from the police station. This is contrary to what was stated in the plaintiffs' statements and contrary to what was stated in a statement made by an independent policeman who was at the police station at the time they left. The Indians, however, said that one of them travelled in the 999 car and that this car stopped on the way, and Mwanthe Kingola was arrested when standing by the roadside, not far from the place where, as they say, the two wheels were earlier found by the Indians.

The prosecution also had a statement from Mutiso Mutua, retracting his confession, on the ground that it was induced by beating, but the prosecution thought so little of this that they decided not to call Mutiso Mutua as a witness in the prosecution of the plaintiffs although he was in the court precincts at the time of the trial. They said that he was not to be considered as a witness who would be likely to tell the truth. Nothing could more clearly indicate lack of faith on the part of the prosecution in the truth of any evidence which Mutiso Mutua might have attempted to give in support of the prosecution. Yet he should have been one of the most important witnesses.

Again, as regards Mwanthe Kingola the prosecution had a statement from him, which tended to support its case, but they elected not to call him as a witness although he was available. They said that he was not to be regarded as a witness of truth.

Summing up, I do not believe for one moment that Mutiso Mutua was beaten at the police station. Why then did he plead guilty, if he was not found with the first wheel or seen in close proximity to it? How can the Indians be believed when they said they found all the wheels, yet one of them stated on the day of the event that they did not recover anything, and that it was the 999 police who

brought the two wheels out from the grass? None of them suggested that any of them had anything to do with the finding of any of the wheels until King interviewed them five weeks or more after the events occurred.

As regards Mutiso Mutua, I cannot see that any reasonable person perusing all the statements could possibly imagine that the prosecution of the plaintiffs was likely to succeed. The plaintiffs' statements were consistent because they were telling the truth of what they knew. They had the man and the wheel and the man pleaded guilty. Their statements were supported by statements from the Indians made on the day of the event, which were perfectly consistent with the plaintiffs' statements. As against that, there were only a number of widely discrepant late statements by the Indians which did not agree with each other and were inconsistent with the statements that were made on the day of the event.

As regards Mwanthe Kingola, there was more to support the prosecution case, but even so, this case depended upon discrepant statements made long after the event which differed from statements made on the day of the event and which should have been discarded as being wholly unreliable in relation to Mutiso Mutua. Some of them were completely inconsistent with facts which were incontestable on the evidence as a whole.

There was evidence from an independent policeman which supported the plaintiffs' statements that the Indians left the police station in their own car, and that one of them did not travel in the 999 car. The allegation that one of them did travel in the 999 car was an essential part of the allegation against the plaintiffs concerning the arrest of Mwanthe Kingola.

Looking at the totality of the material in the hands of the prosecutor at the time when the prosecution was instituted I do not think that any reasonable person could honestly have believed that the prosecution was at all likely to succeed either in the allegations relating to Mutiso Mutua or the allegations relating to Mwanthe Kingola. Certainly it was unlikely to succeed as regards the circumstances of Mutiso Mutua's arrest.

I have yet to consider the fact that the State Counsel directed the prosecution. I have already indicated that I do not consider that this protects the defendants when in fact there was no reasonable and probable cause for the prosecution, but apart from that, although all the papers relevant to the matter appear to have been submitted to State Counsel, they were accompanied by summaries of evidence prepared by King and a report prepared by Mr. Bell who was King's immediately superior officer. These did not do justice to the plaintiffs.

I regarded Bell as a witness who was very substantially biassed and interested to protect King. His report was not a fair report. It omitted all reference to the statements made by Indians on March 14. It omitted all reference to Mutiso Mutua's confession. It stated wrongly that there were no serious discrepancies in the Indians' statements. Throughout the investigation conducted by King and the concurrent investigation into King's conduct, which had been ordered by the Chief Police Officer, Bell was in very close contact with King, and I am quite sure that he was influenced by what King told him. As regards the State Counsel, I did not consider him to be altogether frank in the witness box. At first, when asked if he had had any interviews or meetings with King, he said that he could not remember whether he had or not. I was inclined to doubt him on that, and sure enough before very long he was telling the court that he had visited the scene with King, and he then admitted that he had had several interviews with King, and I have no doubt but that in directing the prosecution he was influenced by King. I acquit him of malice, but I think that he was too prosecution-minded in this matter, and the only

explanation I can find for the fact that he did direct the prosecution of the plaintiffs is that he must have been

influenced by King. When I say he was too prosecution-minded I mean that he was too anxious to find a basis for a prosecution without due regard for the possibility that such a basis was in fact untrue or at least extremely doubtful.

It is however a fact, and in fairness to State Counsel it should be mentioned in this judgment, that on the basis of the covering letter by Bell and the summary of proofs and general summary by King, if these were considered without regard to the earlier Indians' statements and without detailed examination of all the papers on the files submitted to him, the State Counsel could reasonably have formed the opinion that there was reasonable and probable cause for the prosecution.

The covering documents sent with the files did not fairly present the case. The earlier Indians' reports were on separate files. This and the fact that King no doubt verbally pressed the case for a prosecution may have influenced the State Counsel to direct the prosecution to be instituted.

Nevertheless, however this may be, I consider that if all the papers submitted had been reasonably carefully scrutinised and analysed it should have been clear that the prosecution was most unlikely to succeed.

I doubt very much that State Counsel had any real faith in the likelihood of the success of the prosecution. He tried to keep the Resident Magistrate's court ignorant of Mutiso Mutua's confession. He seems to have decided that neither Mutiso Mutua nor Mwanthe Kingola would be witnesses of truth at the time for deciding whether or not to put them in the witness box. I have no doubt but that the prosecution of the plaintiffs both in relation to Mutiso Mutua and Mwanthe Kingola was instituted without reasonable and probable cause, and in my belief without genuine faith in the truth of the prosecution.

There is ample evidence of malice in this case on the part of King. Previously he thought fit to criticise the conduct of the first plaintiff before other policemen of equal or lower rank than the first plaintiff. Neither the first plaintiff nor any other witness appears to have been able to understand the nature or justice of this criticism. He referred to the plaintiff and other African officers of the plaintiff's rank or lower rank in contemptuous terms; in particular, he used the expression "nig nog" in a way which, I am quite satisfied, was intended to be the reverse of complimentary. I think he was concerned to attempt to represent that these officers were unreliable without his supervision and that he was concerned to make appear that his continued service in the force was necessary. This last is surmise but I think it is a reasonable surmise.

On the basis of the material in the police files there was a very strong case against both Mutiso Mutua and Mwanthe Kingola. In spite of this King had those cases withdrawn and decided to make a new investigation all by himself. He did this in a way which could not have had any instructional value to other officers. In fact he made a mess of things. He had two good cases withdrawn and at that time I think in all fairness that he may have believed that they ought to have been withdrawn, but then he found himself the subject of investigation and criticism at the instance of a report made by the first plaintiff. It is perfectly clear that the result of this investigation was not altogether favourable to King. What happened was that the first plaintiff, finding that his two good cases had been withdrawn, remembering King's previous criticism of himself, then finding that King was trying to work up a case against him, which was not a true case, complained to the Chief Police Officer, who ordered an investigation, and thereafter the whole matter became a matter which was the subject of concern on the part of superior police officers who required to be informed of the result of King's investigation in the matter.

The effect of all this upon King was, I am sure, that he felt that he could not

withdraw without admitting that he had made a fool of himself, and that he was not a big enough man to make such an admission. He, therefore, pressed his allegation and the prosecution resulted. I am satisfied that he was actuated by malice in law.

I am quite satisfied that he did endeavour to induce Superintendent Khan to consider that the case against the plaintiffs was one in which bail should not be granted, but the Superintendent wisely did not accept this contention.

As regards the claim for false arrest, I have some doubts. I do not accept without reservation the evidence of King as regards this aspect of the case, nor do I unequivocally reject the evidence of the plaintiffs on this matter, but I am left in sufficient doubt to the extent that I am not satisfied that in fact circumstances amounting to a false arrest occurred. I think that a police officer of higher rank than the plaintiffs could order them to wait in a certain place, intending to apply for a warrant for their arrest.

On the other aspect, that is the claim for malicious prosecution, I have no doubt but that the plaintiffs are entitled to damages. This is an unusual case, because the plaintiffs are still members of the police force, and so far as I know they intend so to remain. I can see no reason why they should not so remain.

The Resident Magistrate's court and this court have both expressed the opinion that the plaintiffs were completely innocent of the charges preferred against them, and I believe that Mr. Oswald, aided by these findings, will be in a position to protect them from suffering in their future career by reason of the fact that these allegations were made against them.

They are, however, clearly entitled to substantial damages but I doubt that it would be to their advantage to decree very heavy damages in this case. I find their general damages at Shs. 3,000/- each. In addition they will have their special damages of Shs. 4,000/-. They must have their costs. They will have interest on the special damages at the rate of 8 per cent per annum from the date of the suit to the date of the judgement; and interest on the decretal amount will run at 6 per cent per annum from the date of the decree.

Judgment for the plaintiffs.

For the plaintiffs:
YP Vohra

For the defendants:
DD Jones (Senior State Counsel, Kenya)

For the plaintiffs:
Vohra & Vohra, Nairobi

Johnson v Moss and others
[1969] 1 EA 654 (HCU)

Division: High Court of Uganda at Kampala

Date of judgment: 4 July 1969

Case Number: 548/1968 (131/69)

Before: Phadke Ag J

Sourced by: LawAfrica

[1] Civil Practice and Procedure – Application – Representation Order – Application may be made ex parte – Civil Procedure Rules, O. 1, *r.* 8 (*U.*).

[2] Civil Practice and Procedure – Application – Representation Order – "Numerous persons" – Exact number need not be stated in application – Civil Procedure Rules, O. 1, *r.* 8 (*U.*).

[3] Civil Practice and Procedure – Club – Action against – Representation Order – Application may be made ex parte – Elected members of committee to represent all members in action for damages for personal injuries.

[4] Civil Practice and Procedure – Representation Order – Application for representation order may be made ex parte – Elected members of Club committee to represent club in action for damages for personal injuries.

[5] Club – Action against – Representation Order – Elected members of committee to represent all club members in action against club for damages for personal injuries.

Editor's Summary

The plaintiff sustained personal injuries while in an unincorporated members' club of which she was not herself a member. She applied successfully *ex parte* for the appointment of the three defendants to represent all the members of the club, and then brought her action. The three defendants were elected members of the committee of the club, the constitution of which provided for management by the committee. The plaintiff alleged that her injuries had been caused by the negligence of the club committee members and in particular by the negligence of the third defendant. The defendants made this application to have the representation order set aside, arguing that the order should have been made on notice to them and not *ex parte*; that the application should have specified the number of persons having an interest in the suit; and that they and the other members of the club did not have the same interest in the suit so as to enable a representation order to be properly made.

Held –

(i) notice of an application for a representation order is not necessary (*Ali bin Khamis'* case (2) distinguished);

(ii) it was not necessary to give particulars in the application of the number of persons having the same interest in the suit;

(iii) the defendants and all the members of the club had the same interest in the suit; and the representation order had been properly made (*Campbell v. Thomson and Another* (3) adopted).

Application to set aside order dismissed.

Cases referred to in judgment:

(1) *Craig v. Kanseen*, [1943] 1 All E.R. 108.

(2) *Ali bin Khamis v. Salim bin Khamis and Others* (1956), 23 E.A.C.A. 195.

(3) *Campbell v. Thomson and Another*, [1953] 1 All E.R. 831.

Judgment

Phadke Ag J: The plaintiff, Penelope Anne Johnson, is an infant suing by her mother as well as next friend Mrs. Nancy Elizabeth Johnson. The three defendants are sued on their own behalf as members and also on behalf of all other members of "The Kilembe Mines Recreation Club" (hereinafter referred to as "the Club") as at January 1, 1966.

Before the institution of her suit, in Miscellaneous Cause No. 67 of 1968, the plaintiff applied to this court, under O. 1, r. 8 of the Civil Procedure Rules, for the court's permission for the defendants to be appointed to represent all the members of the Club as at January 1, 1966. The application, which was made *ex parte* by summons in chambers and was supported by the affidavit of the plaintiff's mother, was heard by Mead, J., who granted the permission sought by the plaintiff. Accordingly this suit was instituted against the three defendants and each of them has separately and in his individual capacity entered appearance.

The defendants have now applied by this notice of motion that the order made by Mead, J. be set aside as a nullity and that all those parts of the plaint showing them as defendants sued in a representative capacity be struck out. The application is made under the inherent jurisdiction of this court and is based upon the undermentioned grounds appearing in the affidavit of their Counsel, Mr. Hunt.

(*a*) That the application in Miscellaneous Cause No. 67 of 1968 should not have been made *ex parte* and should have been served on the proposed defendants to enable them to be represented in such application.

(*b*) That it was never stated how many members there were of the Kilembe Mines Recreation Club, nor were they identified.

(*c*) That it was never stated nor argued that the three proposed defendants and all the members of the Kilembe Mines Recreation Club had the same interest in the subject matter of the dispute nor that all the members of the Club would have the same defences to the action.

(*d*) It appears from the plaint filed that specific allegations are made against the Third Defendant personally to which he would have a defence personal to himself.

At the outset, I would like to mention that at the commencement of the hearing of the application I felt some doubt as to whether I had jurisdiction to entertain an application which had the appearance of an appeal against an order made by a brother Judge. I mentioned my doubt to Mr. Hunt and Mr. Wilkinson, counsel for the plaintiff. Mr. Hunt submitted that as the proceedings before Mead, J., were *ex parte* I had jurisdiction to hear the application and give my decision thereon. He referred to certain observations, quoted below, of Lord Greene, M.R., in *Craig v. Kanseen*, [1943] 1 All E.R. 108, which were accepted by Briggs, J.A., in his judgment in the Court of Appeal in *Ali bin Khamis v. Salim bin Khamis and Others* (1956), 23 E.A.C.A. 195, at page 199:

> "Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled ex debito justitiae to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the Court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary. I say nothing on the question whether an appeal from the order, assuming that the appeal is made in proper time, would not be competent."

Mr. Wilkinson associated himself with Mr. Hunt's submission. Relying upon the decision of the Court of Appeal cited above I am satisfied that I have the jurisdiction to hear this application and give my decision

thereon.

For the purposes of this application it is necessary to briefly state certain facts alleged in the plaint. They are as under:

(1) The plaintiff is the daughter of Mr. Alfred Victor Johnson and Mrs. Nancy Elizabeth Johnson, of Kilembe, both of whom have been members of the Club for several years and were such members during January 1966, Mr. Johnson being the Chairman of the Club on January 1, 1966.

(2) The Club is an unincorporated members' club which caters for the social and recreational needs of certain employees of a company named Kilembe Mines Limited, at Kilembe, and it has a written constitution a copy whereof is annexed to the plaint.

(3) The constitution provides that the Club shall be managed by a Committee, elected at the Annual General Meeting, which shall consist of:

Chairman

Hon. Secretary

Hon. Treasurer

Bar Member

House Member

Entertainment Member

Sports Member

One Other.

(4) On January 1, 1966, the first defendant was the Vice-Chairman, the second defendant was the Secretary, and the third defendant was the Bar Member.

(5) The constitution, under the heading "Authority of the Committee" make the following provision:

"All acts done by the authority of the Committee or of any subcommittee thereof in good faith with the authority expressed or implied of the Club, shall be deemed to be the acts of the Club and of the individual members thereof and shall be binding on the individual members of the Club during the time he or she is a member of the Club and for a period of one year from the date he or she shall cease to be a member of the Club and every Trustee and every member of the Committee shall be indemnified by the Club and by the members thereof for costs, losses, and expenses which any Trustee or any member of the Committee may incur or become liable to by reason of any contracts entered into or act or thing done by him as such Trustees or such other members of the Committee or in any way in the discharge of his duties."

(6) The club building comprises one small hall, one bar and other rooms and conveniences, and the normal position of the dart-board and the darts is inside the bar.

(7) The children of the members of the Club have free access to the hall but are not allowed inside the bar at any time.

(8) On January 1, 1966, modifications and decorations of the bar were taking place, and the third defendant, as the Bar Member, had removed the dart-board and the darts from the bar and had placed them inside the hall.

(9) On the said date, the plaintiff, with the permission of her parents, was seated in the hall when a young boy who was not a member nor the

child of a member picked up a dart and threw it at the dart-board, and upon the dart striking a wire it rebounded and struck the left eye of the plaintiff.

(10) As the result of this accident, the plaintiff sustained injury to the eye, which eventually had to be removed.

(11) It is alleged by the plaintiff that the said accident was caused by the negligence of the Club Committee members and in particular by the negligence of the third defendant, the Bar Member.

(12) The plaintiff's claim in the suit is for general and special damages in respect of the injury sustained by her.

I will now consider the submissions made by Mr. Hunt, and those made by Mr. Wilkinson, upon the grounds advanced in support of this application as hereinbefore set out:

(*a*) Mr. Hunt submitted that the application in Miscellaneous Cause No. 67 of 1968 should not have been made *ex parte* and that the proposed defendants should have been served with the application.

Order 1, r. 8, Civil Procedure Rules, under which the application was made, provides as under:

"(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend in such suit, on behalf of or for the benefit of all persons so interested. But the court shall in such case give notice of the institution of the suit to all such persons either by personal service or, where, from the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the court may in each case direct.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the court to be made a party to such suit."

Mr. Hunt referred to certain rules under some Orders of the Civil Procedure Rules in which rules express provision is made for the making of *ex parte* applications, and pointed out that there is no such express provision in O. 1, r. 8. He also referred to s. 93, Civil Procedure Act, which deals with "Miscellaneous proceedings" and provides that: "The procedure provided in this Act in regard to suits shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction." This provision, according to Mr. Hunt, clearly indicated that a party affected by an application had a right to be served with the application in the same manner as the defendant in a suit had a right to be served with a summons. It is a statutory right and the failure to accord to an affected party the benefit of this right would render the proceedings against him a nullity. He referred to *Ali bin Khamis v. Salim bin Khamis and Others* (*supra*) in which it was observed that where an order is improperly made without serving a person known to be affected by it and having a statutory right to be served before it can be made, the order is a nullity in the sense that it must be set aside ex debito justitiae. Mr. Hunt also referred to O. 48, r. 1, Civil Procedure Rules, which says that all applications, save where otherwise expressly provided for, shall be by notice of motion, and to r. 2 which says that no motion shall be made without notice to the party affected thereby unless the court permits it to be *ex parte* for reasons appearing in the proviso to the rule.

Mr. Hunt submitted that as the defendants who had a statutory right to be served were not served with the application in question, and as the application

was not one which fell within the ambit of the proviso to O. 48, r. 2, the order of Mead, J., be set aside as a nullity, in the inherent jurisdiction of the court.

Mr. Wilkinson submitted that the provision in O. 1, r. 8, Civil Procedure Rules, although it does not expressly provide for the making of an *ex parte* application, nevertheless envisaged that the application can be made *ex parte*. The time for the making of such application is before the institution of the suit when it is not known whom the court will permit to be appointed as defendants in the intended suit. The case of *Ali bin Khamis v. Salim bin Khamis and Others* (*supra*) can be applicable only where a party is shown to have a statutory right of service, and O. 1, r. 8 does not create any such statutory right. Rule 8 only says that notice of the institution of the suit shall be given.

Mr. Hunt's submissions are worthy of careful consideration and I have given them considerable thought. Nevertheless I agree with Mr. Wilkinson that notice of an application under O. 1, r. 8 is not necessary. Rule 8 speaks of obtaining the permission of the court, and although the rule does not expressly say that such permission shall be obtained by an *ex parte* application, the language of the rule, construed as a whole, leads me to think that what is intended is that the application may be an *ex parte* one. The rule provides that notice of the institution of the suit shall be given and this to my mind is the only statutory right created. Had it been the intention of the rule that notice of the application is necessary such a provision would not have been omitted.

Order 48, r. 2, referred to by Mr. Hunt, is not relevant. It refers to a notice of motion whereas the application under O. 1, r. 8 is to be made by summons in chambers as prescribed in r. 22.

(*b*) Mr. Hunt submitted that O. 1, r. 8 is applicable only when there are "numerous persons", and the plaintiff's application did not state the numerical strength of the numerous persons whom it was proposed to make defendants in the intended suit. It was for the court to decide if such persons were "numerous" and it was the duty of the plaintiff to satisfy the court in that behalf by giving full particulars. He pointed out that the plaintiff's father was the Chairman of the Club at the relevant time and such particulars were available to the plaintiff. He referred to some cases in which the exact number of the numerous persons was stated.

Mr. Wilkinson submitted that in as much as Mead, J., granted permission, it must be presumed that he was satisfied that there were numerous persons who were members of the Club. It was now for the defendants to avail themselves of the opportunity afforded by this present application to challenge the plaintiff's contention, if they so wished, by producing particulars to the contrary.

I am not impressed by Mr. Hunt's submission. I propose to make a more realistic approach to the question. The plaint refers to the members of a social and recreational Club of the staff of a large industrial concern, and in the circumstances a court might well feel satisfied, without insisting upon exact figures, that the members of the Club would be numerous. Further, I agree with Mr. Wilkinson that if such were not actually the case the defendants' present application afforded them a suitable opportunity to prove the incorrectness of the plaintiff's statement.

(*c*) and (*d*) Mr. Hunt submitted that there was nothing in the allegations made by the plaintiff that these three defendants and the other members of the Club had the same interest in defending the suit, within the meaning of O. 1, r. 8, Civil Procedure Rules. He referred to a number of English cases in which permission to institute a representative suit had been refused. Many of these cases were considered and discussed by Pilcher, J., in *Campbell v. Thomson and Another*, [1953] 1 All E.R. 831.

In that case, the plaintiff, who was employed by an unincorporated members' club as a cleaner, sustained injuries when she fell down some stairs which she was engaged in cleaning on the club's premises. In an action for damages for breach by members of the club of the duty owed by them to the plaintiff at common law to take reasonable care of her safety as an invitee and/or as a servant of the members the plaintiff sued as defendants the assistant honorary secretary and the chairman of the house committee of the club at the material time. It was held that the members of the club had a common interest in resisting the plaintiff's claim, and consequently it was a proper case under R.S.C., O. 16, r. 9 (which was then in force and was parallel to Uganda Order 1, r. 8) authorising the defendants to defend the claim on behalf of and for the benefit of all the members of the club who were members at the date of the accident.

In his judgment, Pilcher, J., referred to the following statement appearing in Halsbury's Laws of England, Hailsham Edition, Volume 4, at page 503:

> "The question how far the members of a club are liable in tort for the wrongful acts and omissions of the committee, or of officers or servants of the club, is one in regard to which there is practically no authority. In the case of proprietory and incorporated clubs, it would seem that the ordinary rules as to the liability of a master or principal for the torts of his servants or agents apply. As to unincorporated members' clubs, the only reported case is one where the committee of a football club had employed an incompetent person to repair a stand for the accommodation of visitors to view matches, and a visitor, who had sustained injury by the collapse of the stand, brought an action for damages against the committee as representing the whole club. The county court judge at the trial amended the claim and gave judgment against the members of the committee personally, and on appeal the judgment was affirmed on the ground that the members of the committee were the persons primarily liable."

Pilcher, J., observed that the case referred to in the above statement was of no assistance to him. The learned judge then discussed several cases and observed that the question whether or not it is possible in an appropriate case to make an order for the defendants to be sued in their representative capacity under the English Rules of the Supreme Court, O. 16, r. 9, in an action for tort had given rise to some difference of judicial opinion. He felt, however, that in the case before him the defendants who were sued could fairly be taken to represent the body of the club members and that all the members had the "same interest" within the meaning of the rule in resisting the plaintiff's claim.

Mr. Hunt submitted that *Campbell v. Thomson and Another* (*supra*) can be distinguished on the ground that it was a case in which there was no allegation of any overt act whereas the plaintiff's allegation in this suit is based upon an alleged personal negligent act on the part of the third defendant. In my opinion this is a distinction without a difference. Under the constitution of the Club, the third defendant, as the Bar Member, was an elected member of the Committee which managed the Club, and under the constitution all acts done by the authority of the Committee are deemed to be the acts of the Club.

Mr. Wilkinson submitted that *prima facie* the plaintiff's allegations were that the third defendant was acting in the capacity of an agent of the Club, and therefore all the members of the Club had the same interest in defending the plaintiff's suit. There was nothing to indicate that individual members could have different defences to the plaintiff's claim.

I am satisfied that in this suit, as was done in *Campbell v. Thomson and Another* (*supra*), I should allow the three defendants to be sued on their own behalf and on behalf of all the other members of the Club as at January 1, 1966. All the

circumstances of the case are such as to indicate that the plaintiff should be given the opportunity to have recourse to the provision in O. 1, r. 8, Civil Procedure Rules.

Upon this application it is not my province to express any opinion on the merits of her claim. Whatever may be the ultimate outcome of her suit, *prima facie* I consider that the plaintiff should not be denied the remedy of suing the three defendants in a representative capacity. They were at the relevant time the elected members of the Committee and can fairly be said to represent all the members of the Club.

In the result I dismiss the application with costs to the plaintiff.

Application dismissed.

For the applicants:
RE Hunt
RE Hunt, Kampala

For the respondent:
PJ Wilkinson, QC and *VN Ponda*
Ponda, Asaria & Co

Kiwanuka & Co v Walugembe
[1969] 1 EA 660 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	4 July 1969
Case Number:	118/1969 (132/69)
Before:	Phadke Ag J
Sourced by:	LawAfrica

[1] Advocate – Costs – Recovery of costs from client – Suit instituted by advocate for company – Suit dismissed because not authorised by company – Advocate ordered to pay costs personally – Advocate estopped from trying to recover costs from individual director who instructed him.

[2] Company – Director – Director not liable for costs of unauthorised suit instituted in name of company – Advocate estopped from alleging director liable for costs ordered to be paid by advocate personally.

[3] Estoppel – Equitable – By representation – Advocate estopped by accepting instructions to act for company from alleging individual director liable for costs of unauthorised suit ordered to be paid personally by advocate – Person to whom representation made need not alter his position – Evidence Act, s. 113 (*U.*).

Editor's Summary

The plaintiffs, a firm of advocates, accepted instructions given to them by the defendant to act for a company, of which the defendant was a director, in bringing a suit by the company against another party. That suit was dismissed on the ground that the company had not validly authorised the institution of it; and the plaintiffs were ordered to pay the costs of the defendant in that suit personally. The plaintiffs now sought to make the defendant liable for those costs, and brought this action for a declaration that the defendant was so liable.

Held – the plaintiffs in accepting instructions to act for the company had made an unequivocal representation that it was the company for which they were acting; and were estopped from contending otherwise (*Nurdin's* case (1) and *Income Tax Commissioner v. A.K.* (2) applied).

Suit dismissed with costs.

Cases referred to in judgment:

(1) *Nurdin Bandali v. Lombank Tanganyika Ltd*., [1963] E.A. 304.

(2) *Income Tax Commissioner v. A.K*., [1964] E.A. 648.

Judgment

Phadke Ag J: The plaintiffs are a firm of advocates practising as such in Uganda and have an office at Kampala. The defendant is a director of a limited liability company named "Walugembe, Lugobe & Co. Ltd." (which is hereinafter referred to as "the Company") and resides at Masaka.

During 1967 a civil suit was instituted in this court in the name of the Company as the plaintiff against S. P. Jiwa and others as defendants. This was High Court Civil Suit No. 349 of 1967 intituled "*Walugembe, Lugobe & Co. Ltd. v. S. P. Jiwa and Others*". In that suit the plaintiffs acted and appeared for the Company as its advocates. The suit in question was dismissed on the ground that the Company had not validly authorised the institution of the suit in its name, and the court ordered the present plaintiffs, as advocates of the Company, to personally pay the costs of the defendants.

In this suit the plaintiffs seek a declaration that the defendant is personally liable to them for payment of their fees for professional services rendered to and for the disbursements incurred by them for the Company in the aforesaid suit. The plaintiffs also seek an order that their bill of costs in this respect be taxed by the Taxing Officer of this court. The bill of costs, for Shs. 11,181/50 less Shs. 3,000/- received on account, is annexed to the plaint.

The plaintiffs' cause of action against the defendant is set out in paragraph 7 of the plaint, and is as under:

> "The Plaintiffs contend that since there is a decision of this Court in the Civil action concerned that whoever gave instructions to file that suit in the name of the Company had no authority of the Company to do so, it is not now open to the Defendant to say that he acted on the authority of that Company and that therefore he is personally liable to the plaintiffs for their costs for work done at his request and command."

The defendant denies personal liability to the plaintiffs. In his written statement of defence he pleads three grounds as under:

(1) The plaint does not disclose a cause of action in as much as there is no allegation that the bill of costs was presented to the Company and the Company had refused to pay it or that the Company had repudiated the authority or agency of the defendant in incurring the expenses for and on behalf of the company.

(2) To the knowledge of the plaintiffs the defendant had acted as the officer and agent of the Company, and the plaintiffs having accepted the position as such and having received payment on account from the Company are estopped from making a claim against the defendant.

(3) The plaintiffs did not do work for the defendant and the defendant had not personally received any benefit from the work done by them.

Mr. B. K. M. Kiwanuka, a partner in the plaintiff firm, stated in evidence that during 1967 the defendant visited him at his office. In the first instance he was instructed to take steps for the arrest of S. P. Jiwa, a director of the Company, for misappropriation of the funds of the Company. He took certain steps and referred the matter to the Director of Public Prosecutions, but there was no prosecution against S. P.

Jiwa. Then the defendant informed him that the Company had passed a resolution for the institution of a civil suit

against S. P. Jiwa and two others and instructed him to file a civil suit. Accordingly Civil Suit No. 349 of 1967 was filed. The High Court held that the said suit had been wrongly instituted in the name of the Company and dismissed the suit. His firm was ordered to pay the costs of the defendants. His firm then prepared a bill of costs for professional fees and disbursements and sent it to the defendant who had given the instructions for the institution of the suit. The defendant refused responsibility for payment of the bill of costs.

In cross-examination he stated that as far as he could recollect this was the first occasion on which he had acted for the Company, and he acted on instructions from the defendant. He relied upon the defendant's word that a resolution had been passed by the Company. He advised that a suit could be instituted and was instructed by the defendant to do so. He understood that he was acting for the Company, but as it turned out later the defendant had misled him.

He did not write to the Company because he relied upon the defendant's word. He received an initial payment of Shs. 3,000/- by cheque but could not recollect whether the cheques were drawn by the Company or the defendant.

Mr. Walugembe, the defendant, stated in evidence that during October 1967 he and another director of the Company, Mr. Lugobe, consulted Mr. Kiwanuka about the affairs of the Company. One of the directors of the Company, namely S. P. Jiwa, had wrongfully appointed two new directors and the Registrar of Companies had mentioned that the matter of these appointments be challenged by legal action. He and Mr. Lugobe were advised by Mr. Kiwanuka to file a civil suit in the name of the Company and a suit was accordingly filed. The initial payment of Shs. 3,000/- to the plaintiffs was made by two cheques, of Shs. 2,000/- and Shs. 1,000/- respectively, drawn by the Company. He and Mr. Lugobe are still directors of the Company and the Company had not received the plaintiffs' bill of costs.

In cross-examination he denied that he alone visited Mr. Kiwanuka. He was always accompanied by Mr. Lugobe and both had informed Mr. Kiwanuka that they had, as directors of the Company, passed a resolution for the institution of the Company's suit against S. P. Jiwa and Others. When he received the plaintiff's bill of costs he denied responsibility for payment.

Mr. Kiwanuka and the defendant were the only witnesses called in the case, and their evidence outlined above shows that upon the facts there is no conflict as regards what actually transpired between them. The conflict is as to the manner in which what transpired was understood by each party.

The defendant stated that he gave instructions to Mr. Kiwanuka on behalf of the Company. Mr. Kiwanuka stated – to quote his own words – "I understood that I was acting for the Company." That this was the true understanding between the parties is also clear from the fact that the two cheques were drawn by the Company. I accept the defendant's evidence that the cheques were drawn by the Company in preference to Mr. Kiwanuka's statement that he was unable to say by whom the cheques were drawn.

What then is the ground upon which the plaintiffs now seek to hold the defendant personally liable to them? The plaintiffs contend that because it was the defendant who gave instructions and because it turned out later that Mr. Kiwanuka was "misled" by the defendant, the defendant should be held to be personally liable.

I see no merit in this contention. Firstly, instructions on behalf of the Company could only have been given by some individual, and the defendant is a director of the Company. Secondly, there is no evidence that the defendant did anything deceitful as a result of which Mr. Kiwanuka could have been misled as

alleged by him. I accept the defendant’s evidence that he and Mr. Lugobe

told Mr. Kiwanuka that they had passed the resolution of the Company authorising the institution of the Company's suit against S. P. Jiwa and Others. Mr. Kiwanuka's evidence was that he accepted the defendant's word as being truthful and advised the filing of the suit in the name of the Company.

In the circumstances, in my opinion all the plaintiffs' claims to fasten personal liability upon the defendant amounts to is that, although the plaintiffs agreed to act for the Company, they now wish to hold the defendant personally liable because as things turned out later the Company had never validly authorised the institution of the suit. This attitude of the plaintiffs is, in my opinion, clearly an afterthought formed in the light of subsequent events which can have no bearing upon what actually transpired between the parties at the time Mr. Kiwanuka accepted instructions to act.

I find that Mr. Kiwanuka, in accepting instructions to act for the Company according to his understanding, made an unequivocal representation to the defendant that it was the Company for whom he was acting. The question which arises is, are the plaintiffs estopped, by reason of Mr. Kiwanuka's conduct, from now contending otherwise.

Estoppel is defined in Section 113, Evidence Act, as under:

> "When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

The scope of this definition was examined at length by Newbold, J.A. (as he then was) in the decision of the Court of Appeal in *Nurdin Bandali v. Lombank Tanganyika Ltd.*, [1963] E.A. 304. It was held that an equitable estoppel falls within the definition. Newbold, J.A., observed that:

> "The precise limits of an equitable estoppel are, however, by no means clear. It is clear, however, that before it can arise one party must have made to another party a clear and unequivocal representation, which may relate to the enforcement of legal rights, with the intention that it should be acted upon and the other party, in the belief of the truth of the representation, acted upon it."

I would also like to refer to *Income Tax Commissioner v. A.K.*, [1964] E.A. 648, a Kenya case in which it was held by Madan, J., that as far as equitable estoppel is concerned, it is not, as in the case of common law estoppel, necessary for the person to whom the representation in the form of a promise is made to have altered his position on the strength of the promise. I am in respectful agreement with the view of that learned Judge.

Applying the law, as I understand it from the cases cited above, to the facts as found by me, I hold that in this case the defence of estoppel succeeds. In the light of this decision I do not consider it necessary to deal with the other two defences.

For the reasons given above I decline to make the declaration sought by the plaintiffs, and I dismiss the plaintiffs' suit with costs to the defendant.

Suit dismissed.

For the plaintiffs:
J Sendege
SW Munabi, Kampala

For the defendant:

C Binaisa, QC and *SW Munabi*

D T Dobie & Co (U) Ltd v Commissioner-General of Customs and Excise
[1969] 1 EA 664 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	19 July 1969
Case Number:	11/1969 (133/69)
Before:	Mukasa Ag J
Sourced by:	LawAfrica

[1] Customs and Excise – Condemnation of uncustomed goods – Procedure for condemnation in proceedings instituted by claimant at instance of Commissioner – East African Customs Management Act 1952, *s.* 161.

[2] Customs and Excise – Forfeiture of uncustomed goods – "Owner" – Importer of vehicle remains owner of it and duty remains payable notwithstanding vehicle ordered by Embassy – Terms of order requiring vehicle to remain property of importer until paid for – Vehicle rightly seized as uncustomed when not paid for – East African Customs Management Act 1952, *ss.* 2 (1) (*b*); 147 (*a*) (*iii*), 155 *A* (*c*) *and* 158 (1); *Customs Tariff Act* 1968, *s.* 1 *and Third Schedule, Part A, para.* 5 (1) (*U.*).

[3] Sale of goods – Passing of property – Terms of order – Property to remain in seller until goods delivered and paid for – Effect – Goods not "purchased" within Customs Tariff Act, s. 1 (4) (*a*) (*U.*).

Editor's Summary

The Sudanese Embassy in Uganda ordered a vehicle from the plaintiffs, who were car dealers. The vehicle would have been exempt from customs duty (as being for the official use of a foreign Embassy) if it was purchased before clearance through the customs. The order form, however, made it a condition of the sale that the car should remain the property of the plaintiffs until delivered and paid for. The plaintiffs cleared the car from bond without paying duty, and kept the car in their showroom. The Embassy failed to pay for it. The Commissioner of Customs and Excise seized the car as uncustomed. The plaintiffs brought this suit to recover the car; and the Commissioner asked for it to be condemned.

Held –

(i) the plaintiffs were still the "owners" of the car on the date of seizure;

(ii) customs duty was payable on it;

(iii) therefore the seizure and detention of the car by the Commissioner were lawful;

(iv) although there was some doubt as to whether the suit had in fact been instituted in accordance with the provisions of s. 161 of the East African Customs Management Act 1952, nevertheless the plaintiffs, having specifically pleaded that the suit had been so instituted, the provisions of that section should be applied and the car should be condemned.

Suit dismissed. Vehicle ordered to be condemned.

Cases referred to in judgment:

(1) *Osgood v. Nelson* (1872), L.R. 5 H.L. 636.

Judgment

Mukasa Ag J: In this suit the plaintiffs, Messrs. D. T. Dobie & Co. (Uganda) Limited, sued the Commissioner-General of Customs and Excise for seizing and detaining a Mercedes Benz motor car valued at Shs. 50,500/- and damages.

On June 25, 1968, an official of the Sudanese Embassy in Uganda ordered a new Mercedes Benz 220 from the plaintiff Company (hereinafter referred to simply as the plaintiff), and signed a vehicle order form (Ex. PL 1).

On or about August 8, 1968, the plaintiff cleared of customs duty one 220 Mercedes Benz ex-warehouse as shown on Ex. PL 2.

The Embassy concerned never took possession of this Mercedes Benz (hereinafter referred to as the Motor Vehicle) as they were in difficulty obtaining funds with which they could pay for it from Khartoum. The plaintiff then left the motor vehicle in their showrooms.

On or about October 28, 1968, an official of the Customs and Excise department who happened to be at the plaintiff's premises saw the motor vehicle and asked why it had been placed in the plaintiff's showrooms. When the plaintiff informed him that the Sudanese Embassy had not been able to pay for and take it, he seized it. On October 29, 1968, the motor vehicle was taken away by this official who is still keeping the same, despite the letters which were produced to him from the Sudanese Embassy as well as from the plaintiff's advocates.

The plaintiff then brought this action against the Commissioner-General of Customs and Excise (hereinafter referred to as the defendant) for wrongful detention of the motor vehicle plus damages.

The defendant, while admitting seizing the motor vehicle, denied any liability for the same. He claims it was a lawful seizure under the law and as such no damage was caused or accrued to the plaintiff.

At the hearing of this suit six issues were framed as follows by both parties:

1. Who was the owner of the motor vehicle in dispute on the date of seizure?
2. Was duty payable on the motor vehicle at the time of the seizure or not?
3. Were Messrs. D. T. Dobie (Uganda) Ltd. at the material time (of seizure) acting as agents of the Sudanese Embassy?
4. Was the seizure of the motor vehicle and its detention lawful or not?
5. If the motor vehicle in dispute was in the ownership of the Sudanese Embassy at the time of the seizure, was duty payable on it?
6. If the motor vehicle was in the ownership of D. T. Dobie (Uganda) Ltd. at the time of the seizure, was duty payable?

It is quite clear from the evidence of Mr. Vasani, the Sales Manager of the plaintiffs, and the vehicle order form (Ex. PL 1), that the Sudanese Embassy had only an agreement to buy any Mercedes Benz of type 220 and black in colour. This agreement was also subject to certain conditions which are endorsed at the back of the form. Conditions No. 2 and No. 4 are important in this case for they read as follows:

"2. Delivery is to be taken at the seller's place of business within seven days of notification to the customer that the vehicle is ready for delivery. The vehicle and other articles ordered (which latter articles in this schedule are called "the accessories") will remain the property of the seller until actual delivery and full payment are made.

4. If the customer shall fail to take and pay for the vehicle and the accessories within seven days of notification as aforesaid the seller shall be at liberty to treat the order as repudiated by the customer and thereupon

> any deposit previously paid shall be forfeited and retained by the seller as liquidated damages and the seller shall be entitled to dispose of the vehicle and the accessories as he shall think fit and shall not be under any liability to account to the customer for the price received therefore or for the said deposit or otherwise."

This agreement was signed by the parties on June 25, 1968. These paragraphs were not cancelled out at all. They were operative at all times.

The letter which was written by the official of the Sudanese Embassy after the customs official had intervened also states that they had placed an order with the plaintiff for a new black Mercedes Benz Model 220. No specific chassis or engine numbers are referred to. This letter ends up only by confirming that they were "still interested in the car".

However, the plaintiff had cleared this particular motor vehicle, which was seized by the defendant's officials, on or about August 7, 1968, from the bonded warehouse on the ground that the same had been bought by the Sudanese Embassy. The plaintiffs then were treating the motor vehicle on August 7, 1968, as the property of the Sudanese Embassy, whereas at the same time, by their agreement on the order form, they were denying it on the strength of the conditions 2 and 4.

The Sale of Goods Act (Cap. 79) has no special definition of who is an owner as such, but according to the East African Customs Management Act, s. 2(1) (*b*), an owner in respect of goods is defined as follows:

> " 'Owner' in respect of goods includes any person (other than an officer acting in his official capacity) being or holding himself to be owner, importer, exporter, consignee, agent or the person in possession of or having control of, or power of disposition over the goods."

Both Ex. D 2 and Ex. PL 2 show clearly that this motor vehicle was imported from the manufacturers by the plaintiff, because the engine and chassis number are specifically referred to therein.

I then find that the motor vehicle remained the property of the plaintiff at all times notwithstanding the making of the agreement on the order form between them and the Sudanese Embassy, who only had an interest in any Mercedes Benz of similar make to the motor vehicle on the date of its seizure. The Sudanese Embassy never then acquired any ownership of the motor vehicle within the meaning of s. 2 of the Customs Management Act referred to earlier on.

Was duty then payable on the motor vehicle on or about October 29, 1968?

Section 1 of the Customs Tariff Act 1968 makes it imperative to charge customs duty on all motor cars imported. The duty chargeable is contained in Schedule I (see chapter 87 at p. 188 of Schedule 2 to the Act). The only relevant exceptions to this duty are referred to in s. 1 (4) (*a*) of the Act which reads:

> "no import duty shall be charged on the goods listed in Part A of Schedule 3 to this Act when imported or purchased before clearance through the customs for the use of one of the persons named in that Part. . . ."

Foreign Embassies are so named.

Definitely the motor vehicle was not imported or purchased before clearance through the customs by the Sudanese Embassy, since up to the present day the Embassy concerned has never bought the motor vehicle. Only it has an interest in a similar vehicle in make and specifications. The provisions of the Third Schedule, 5 (1) have no application, for the motor vehicle is the property of the plaintiff.

It is of great significance to note that on the date the motor vehicle was seized there was also another Mercedes Benz 250SE which was being kept by the plaintiff in similar manner for the Congolese Embassy. When the plaintiffs were asked about it, they admitted they had kept it in contravention of the Customs Laws. They agreed to pay there and then the compounded fine of the customs duty, as the papers contained in the agreed bundle show.

The position of the motor vehicle was not different either.

The managing director of the plaintiff claimed that they could not afford to sell the motor vehicle to any other person not exempted from paying customs duty without such a thing being discovered, because the Registration authority would at once discover it.

That may well be so, the motor vehicle being registered in Uganda, but what would happen if the sale was effected with someone who did not require such registration in Uganda, say the Republic of Ruanda or Burundi or the Congo? Definitely the motor vehicle could physically be disposed of in that way without the customs duty being paid, for the customs officials had no control any more, once the motor vehicle was released as exempted from the bonded warehouses. It is another matter whether morally this could not be done, due to the standing of the plaintiff company.

One wonders too why the plaintiff never informed the customs officials before, once they got into a dilemma after the Sudanese Embassy had failed to collect the motor vehicle.

They knew they had cleared the motor vehicle before it was actually bought by the Embassy which was contrary to the customs law.

The alternative was for the plaintiff to pay the duty on the motor vehicle and claim refund of it from the Commissioner after the Embassy would have actually bought the motor vehicle in accordance with the provisions of s. 3 of the Customs Tariff Act 1968.

It was unreasonable to expect the Customs Officials to be the ones responsible to make enquiries from the Embassy, since they (customs officials) were not the ones selling the motor vehicle to the Embassy. Their duty is to collect the customs duties only. When they came across the motor vehicle and found that no duty had been paid on it, they had a right to seize it under ss. 147 (*d*) (iii), 155A (*c*) and 158 (1). Section 147 (*d*) (iii) reads as follows:

> "Any person who acquires, has in his possession, keeps or conceals or procures to be kept or concealed, any goods which he knows, or ought reasonably to have known to be uncustomed goods shall be guilty of an offence against this Act and liable on conviction thereof to imprisonment for a term not exceeding three years or to a fine not exceeding ten thousand shillings, or to both such imprisonment and fine."

Section 155A (*c*) reads as follows:

> "In addition to any other circumstances in which goods are liable to forfeiture under the provisions of this Act the following goods shall be liable to forfeiture . . . any uncustomed goods."

Section 158 (1) reads as follows:

> "Any officer, or any police officer, may seize any vessel, vehicle, goods, animal or other thing liable to forfeiture under this Act, or which he has reasonable grounds to believe is liable to such forfeiture; and any such vessel, vehicle, goods, animal or other thing, may be seized whether or not any prosecution for any offence against this Act which rendered such

vessel, vehicles, goods, animal, or other thing, liable to forfeiture has been, or will be taken."

It is immaterial whether or not any prosecution was ever instituted against the plaintiff in respect of the motor vehicle, as was intended to be started in respect of the other Mercedes Benz 250SE of the Congolese Embassy, a matter which was compounded by the Commissioner-General at the request of the plaintiffs.

I am unable to believe Mr. Wallis, the Managing Director of the plaintiff company, when he says that at the time he signed Ex. D 1, it was presented to him by the Customs Officer Mr. Wainaina who told him that he should sign it because they had kept the motor vehicle in the showrooms too long.

Whether or not Mr. Wainaina was present at the time EX. D 1 was signed by Mr. Wallis is not of much importance. What matters really is the fact that Mr. Wallis, a person of five years' experience at his job, did sign such a document which he said he read and understood the contents thereof. He must have known then that he was pleading guilty to having committed the customs offence, which Mr. Wainaina said he pointed out to the plaintiff company, i.e. keeping uncustomed goods.

He then further requested the Commissioner to compound the offence under the powers conferred to him in the Act, and the fine which was imposed was finally paid by the company as the receipt contained in the agreed bundle shows.

It may well be that the plaintiffs treat their customers, especially of the Diplomatic Corps, with great courtesy, but such courtesy should stop where it induces them to act contrary to the law. The plaintiff should be bold enough even to inform their customers of this particular class that what they ask to be done is beyond what is permitted to be done by the law and that could not bring down their standard of politeness in any way.

Advocate for the plaintiff argued before the court that the Customs Official, Mr. Wainaina, did not exercise his powers of seizure reasonably and as such this court should enquire into this now. He referred to the case of *Osgood v. Nelson* (1872), L.R. 5 H.L. 636.

The case referred to above, as I understand it, decided only one thing, that the court should only interfere where a corporation is given powers to dismiss one of its employees if the corporation in dismissing that employee acted unlawfully.

The court will not interfere if it finds that the corporation acted lawfully but not wisely or discreetly.

This case has no application to the present case at all. Even if it had, I cannot find where Mr. Wainaina acted unlawfully when he seized the motor vehicle, for even if he acted unwisely, that is of no help to the plaintiff's case, however widely one may construe the *Osgood* case.

I will now deal with the issues which were framed by the parties in form of questions put by answering them.

1. The plaintiffs.
2. Yes, it was payable.
3. No, they were not.
4. Both the seizure and the detention of the motor vehicle were lawful.
5. It was not in the ownership of the Sudanese Embassy.
6. It was in the ownership of the plaintiff and duty was payable on it.

Accordingly the plaintiff’s suit fails, and it is hereby dismissed with costs.

Advocates for the defendant asked this court that under s. 161 (4) of the Act the motor vehicle be condemned.

Has the procedure required to be followed prior to such condemnation been satisfied?

I said earlier on the motor vehicle on October 29, 1968, was "uncustomed goods", and as such liable for seizure by a customs officer or police. The motor vehicle was then seized by the Customs Officer. The procedure thereafter to be followed is found under ss. 159 and 160 and 161 of the Act.

As the plaintiffs were present at the time of the seizure s. 159 (*b*) applied and no notice was required to be given of such seizure.

I think the court will be justified in treating the letter of the plaintiff's advocate to the Commissioner dated November 12, 1968 (contained in the agreed bundle) as the claim made on behalf of the plaintiffs under s. 159 (3) (*b*) and (4). It was within a month from the date of the seizure too, i.e. October 29, 1968. That is why the motor vehicle was thereafter detained by the Commissioner under s. 159 (5).

No prosecution was instituted, therefore s. 160 was passed over.

But the Commissioner never gave the plaintiffs notice requiring them to institute proceedings for recovery; nor did he (the Commissioner) institute proceedings for condemnation at any time, though the written statement of defence to this suit asked for this condemnation. (I shall return to this last point later on.)

Therefore the provisions of s. 161 (1) were also left over.

Then the provisions of s. 161 (3) had also no application at all. It would still be the same thing if the plaintiffs had not sued the Commissioner as they did, for the Commissioner had never required the plaintiffs to institute any proceedings. The only letter which the Commissioner wrote to plaintiff's advocate, which is contained on the agreed bundle, dated November 20, 1968, is silent on the matter.

It would appear then the only provisions to apply were of s. 161 (2) which read as follows:

> "Where the Commissioner fails within such period of two months either to require the claimant to institute proceedings, or himself to institute proceedings, in accordance with the provisions of sub-section (1), then such thing shall be released to the claimant."

I need not set out the contents of the proviso for they do not apply to the motor vehicle which was seized in this particular case.

The two months then expired on or about January 12, 1969 calculated with effect from November 12, when advocate for the plaintiff gave notice of the plaintiff's claim of the motor vehicle.

The detention of the motor vehicle however up to this time was lawful, for it was authorised by s. 159 (5) which reads as follows:

> "Where any notice of claim has been given in accordance with the provisions of sub-section (4) then the thing seized shall be detained by the Commissioner to be dealt with in accordance with the provisions of the Act."

However on January 8, 1969, i.e. before the expiration of the two months' period within which the Commissioner could resort to the provisions of s. 161 (1), the plaintiffs filed this action.

Returning to the question of the instituting of recovery proceedings, a big question is now put as follows: Was this suit so filed by the plaintiffs then instituted in accordance with the provisions of s. 161 of the Act?

The answer to this question becomes very important for deciding whether or not the defendant's claim to condemn the motor vehicle now can be granted or refused, for s. 161 (4) reads as follows:

> "Where any proceedings have been instituted in accordance with the provisions of this section, then:
>
> (*a*) if the court is satisfied that such thing was liable to forfeiture under this Act, such thing shall be condemned;
>
> (*b*) if the court is not so satisfied, such thing shall be released to the claimant";

and it was this sub-section which advocates for the defendant asked this court to act upon.

From the facts as they appear it looks as if the plaintiffs did not file this suit, because they were so required by the defendant; but since the plaint itself (paragraph 2) states that the suit was filed under s. 161 (1) (*a*), and this was admitted in the written statement of defence filed by the Commissioner, this court will not go beyond that.

It will likewise accept that it was so. Then the answer to the above question is "Yes".

It therefore follows that as this court is satisfied that the motor vehicle was uncustomed, it was liable to forfeiture under the Act when this suit was filed.

Accordingly under s. 161 (4) (*a*) the motor vehicle is condemned, and it is so ordered now.

Suit dismissed. Vehicle condemned.

For the plaintiff:
JWR Kazzora
Kazzora & Co, Kampala

For the defendant:
BCW Lutta (Counsel to the East African Community)
The Counsel to the East African Community

M v Commissioner of Income Tax
[1969] 1 EA 671 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	19 May 1969
Case Number:	13 and 14/1969 (112/69)
Before:	Madan J
Sourced by:	LawAfrica

[1] Income Tax – Appeal-Extension of time – To file memorandum – Interpretation of "other reasonable cause" in proviso to s. 3 (1) *of the Income Tax* (*Appeals to Kenya High Court*) *Rules* 1959 *– What constitutes "other reasonable cause" is a question of fact in each case.*

[2] Income Tax – Appeal-Memorandum of Appeal – Failure by taxpayer to file separate memorandum for each year of assessment may result in the appeal being struck out – Whether extension of time may be given to enable separate memorandum to be filed.

Editor's Summary

A taxpayer appealed against income tax assessments for the years 1963, 1964 and 1965. On January 24, 1968, the appeals were struck out on the grounds that one memorandum of appeal instead of a separate memorandum in respect of each of the three years of assessment had been filed. An application for extension of time for filing the three memoranda of appeal was made under the proviso to rule 3 (1) of the Income Tax (Appeals to Kenya High Court) Rules 1959. An extension of time may be granted where the Judge is satisfied that owing to absence from the country, sickness or "other reasonable cause", the appellant was prevented from presenting such memorandum of appeal, and there has been no unreasonable delay. The applicant's advocate received instructions in February 1968 to appeal against the assessments for the three years mentioned. Senior Counsel drafted a pro-forma memorandum, but on May 30, 1968, the advocate made a mistake by not filing a separate memorandum for each of the three years. In *Robson v. Commissioner of Income Tax*, [1968] E.A. 415 the Commissioner had waived any technical objection to a failure by a taxpayer to file a separate memorandum in respect of three separate assessments to avoid multiplicity of proceedings and general inconvenience and the court had expressed approval of the waiver in its judgment. In earlier cases waivers had been made. The advocate hoped that the Commissioner of Income Tax would waive in this case, but the Commissioner did not do so. It was contended (*inter alia*) for the Commissioner (i) that under the rules "or other reasonable cause" should be construed "ejusdem generis" and only physical disability preventing the giving of a notice of appeal is sufficient to permit extension of time; (ii) that in any event the advocate's mistake as to the law and procedure does not constitute "reasonable cause".

Held –

(i) "or other reasonable cause" is not to be construed ejusdem generis with absence from the country or sickness;

(ii) on the facts, there was "reasonable cause".

Time to file appeal extended. Applicant to pay respondent's costs.

Cases referred to in judgment:

(1) *Northern Province Labour Utilisation Board v. The Commissioner of Income Tax*, [1960] E.A. 1015.

(2) *Shabir Din v. Ram Parkash Anand* (1955), 22 E.A.C.A. 48.

(3) *Gatti v. Shoosmith*, [1939] 3 All E.R. 916.

(4) *Sardar Shroff v. The Commissioner of Income Tax*, [1964] E.A. 484.

(5) *Vincenzini v. The Commissioner of Income Tax*, [1963] E.A. 162.

(6) *Robson and another v. Commissioner of Income Tax*, [1968] E.A. 415.

Judgment

Madan J: These two applications have been consolidated by consent of the parties.

The applicants were appellants versus the Commissioner of Income Tax respectively in Civil Appeals No. 61 and 62 of 1968. On January 24, 1969, on a preliminary objection taken before me by the respondent, their appeals were ordered to be struck out on the ground that they were incompetent because only one memorandum of appeal had been lodged relating to assessments for the years 1963, 1964 and 1965, instead of a separate memorandum in respect of each assessment appealed against.

The applicants are now seeking an order for extension of time for filing of memoranda of appeal, under the proviso to rule 3 (1) of the Income Tax (Appeals to Kenya High Court) Rules 1959. The respondent is opposing the making of the order.

The proviso to rule 3 (1) reads as follows:

> "Provided that, where a judge is satisfied that, owing to absence from the country, sickness, or other reasonable cause, the appellant was prevented from presenting such memorandum of appeal within such period and that there has been no unreasonable delay on his part the judge may extend the period within which such memorandum of appeal shall be presented."

Mr. Khaminwa, learned counsel for the respondent, has submitted that this is not the first time the applicants have come to court with an application of this nature. In Miscellaneous Application No. 33 of 1968, applicant M. applied for extension of time for the giving of Notice of Appeal under s. 111 (3) of the East African Income Tax (Management) Act 1958. Dalton, J., who heard the application, granted it. Mr. Khaminwa says the learned Judge misdirected himself. He may so argue but it would be well to remember the respondent did not oppose the application though he did take the point that the application could not be granted as the confusion necessitating it was a mistake on the part of the advocate, and no reasonable cause had been shewn. The respondent also did not appeal against the court's ruling. Whatever the merits of the matter then, the applicants may have been tardy, it is in the past and the applicants' conduct has not been reprehensible repeatedly enough to amount to an abuse of the process of the court. There should be no condemnation on account of it. The applications now before me must succeed or fail on their merits.

As I understand it, Mr. Khaminwa has ably argued the respondent's objection that the two appeals were ordered to be struck out because they were not properly before the court owing to a mistake of law and procedure made by the advocate; that an error on the part of the advocate does not constitute reasonable cause. The express power of the court to grant extension of time is derived from the proviso to r. 3 (1) which is mandatory in its terms and must be construed strictly. In order to constitute reasonable cause the court must be satisfied the applicants were prevented from lodging their appeals within time by actual physical impediment coming from extraneous interference by an agency outside their control. There was no such impediment here. Also, the words "or other reasonable cause" are to be read ejusdem generis with absence from the country or sickness appearing in the proviso.

Now the order striking out the appeals was not made for lack of merit in them. Even at this stage I do not know if there is any merit in them. I do know that the main issue, the real issue in the proceedings, is the question of the true tax liability of the applicants.

The argument that the words "or other reasonable cause" are to be construed ejusdem generis is inspired by the judgment of the Tanganyika High Court in *Northern Province Labour Utilisation Board v. The Commissioner of Income Tax*, [1960] E.A. 1015, which held accordingly, and also that both absence and sickness connote a physical impediment preventing notice of appeal being given (under s. 111 (3)), whereas there is no such element in the slip of an advocate. Dalton, J., considered it in Miscellaneous Application No. 33 of 1968 (*supra*) but refused to follow it saying that he was not persuaded the decision of the Tanganyika High Court that the words "or other reasonable cause" should be construed ejusdem generis with the words "absence from the Territories" and "sickness" is correct. He said he preferred to follow the reasoning in the judgment of Briggs, J.A., in *Shabir Din v. Ram Parkash Anand* (1955), 22 E.A.C.A. 48, where it was held that the mistake or misunderstanding of the plaintiff's legal advisers, even though negligent, may be accepted as a proper ground for granting relief under O. IX, r. 20 of the Civil Procedure (Revised) Rules 1948, the discretion of the court being perfectly free and the words "sufficient cause" appearing in the rule not being comparable or synonymous with "special grounds". Rule 20 provides that an order for the dismissal of a suit made under the preceding r. 19, where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, may be set aside by the court if satisfied there was "sufficient cause" for non-appearance.

In the *Shabir Din* case the court of appeal granted relief even though it took the view that the advocate's conduct amounted to negligence in the conduct of his client's case. Briggs, J.A., expressed the opinion, with which the President and the Acting Vice-President of the court agreed, that a mere oversight on the part of an advocate or clerk *can* be "sufficient cause". Whether it is so or not is a question depending on the facts of each case. The reasons for non-appearance may be sufficient to enable a party to set aside an *ex parte* decree without being in any way special. Briggs, J.A., also said that the principles to be applied by the High Court here in deciding such a matter should be those laid down in *Gatti v. Shoosmith*, [1939] 3 All E.R. 916, and he quoted the following passage from the judgment of Greene, M.R., at p. 919:

> "On consideration of the whole matter, in my opinion under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say 'may be' because it is not to be thought it will necessarily be exercised in every set of facts . . . There is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case. There may be facts in a case which would make it unjust to allow the appellant to succeed upon that argument.
>
> The discretion of the court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised."

I understand the decision of our court of appeal to mean that the scope of the words "sufficient cause" is not to be curtailed by placing a limited interpretation upon their meaning or by reading into them the requirements of special grounds. I would respectfully agree. Indeed, I think no limitation should be prescribed to say what particular set of circumstances will constitute

sufficient cause. The field must be left open to judge each case upon its own particular facts. The facts in each case, individual and different as they are bound to be, must be evaluated to determine whether sufficient cause is made out.

The decision of the Court of Appeal is not only binding but it also facilitates in construing other expressions of like import. Notwithstanding that, the words "or other reasonable cause" are to be construed in their own context. The Privy Council said in *Sardar Shroff v. The Commissioner of Income Tax*, [1964] E.A. 484, at p. 487, that r. 3 is complete in itself in laying down the grounds upon which an extension of time may be granted.

With respect, I too think the Tanganyika High Court erred in holding that the words "or other reasonable cause" are so encompassed that they must be construed ejusdem generis, and that absence connotes a physical impediment. Not necessarily so. Absence does not necessarily connote a physical disability preventing a notice of appeal being given or an appeal being lodged both of which can be done through the agency of legal representatives, or personally without the appellant himself being present in the country.

If the court is to give an intelligent interpretation to the legislation, and not to construe it in a manner which will imply into it a meaning not expressly provided for, the words "or other reasonable cause" must be considered separately and independently of absence or sickness otherwise these words become inexplicable. If the legislature intended the words to be construed ejusdem generis or otherwise to restrict their scope, it could easily have used the words like "or other physical impediment", or "or other special grounds", or words to that effect.

There is no need to fumble. There is judicial authority which then was of the highest binding force as to the meaning of these words. In the *Sardar Shroff* case, (*supra*) at p. 487, the Privy Council further said there is no limit to the power of the court to consider any reasonable excuse (inaccurately set out in the head-note as any reasonable appeal) put forward by the appellant. Woe unto me if I make myself impudent to whittle down this expansive interpretation enunciated by the Privy Council.

The restricted interpretation sought to be established by the respondent could turn the effect of the income tax rules into means of depriving a taxpayer of the right of appeal under the Act. The proposition is unsound in law. In *Vincenzini v. The Commissioner of Income Tax*, [1963] E.A. 162, at p. 166, the Privy Council said:

> "Mr. Dingle Foot put forward in the forefront of his argument the submission that if the effect of any of income tax rules was to derogate from the taxpayer's right of appeal conferred by the Income Tax (Management) Act, 1958, such rules would be ultra vires; and he cited authorities in support of his submission. As a matter of general principle their lordships have no hesitation in accepting this submission."

The Privy Council referred to the matter again in the *Shroff* case at p. 487:

> "Finally, it was argued that it had been pointed out by their Lordships in the case of *Vincenzini v. Regional Commissioner of Income Tax* that the rules are procedural and are to be construed subject to the overriding consideration that the right of appeal provided by the statute survives."

The words "or other reasonable cause" are no less embracing than "sufficient cause". If anything by introducing the notion of reasonableness in place of sufficiency, I think the legislature expanded the scope and thereby also enlarged the court's discretion to grant relief in cases of this nature.

I hold that a mistake, even though negligent, can be reasonable cause within

the ambit of r. 3 (1), and, depending upon the facts of the particular case, it could be excusable.

The facts are stated in the affidavit of Mr. Akram, the applicant's advocate. They are to the effect that he received instructions sometime in February 1968 to appeal against the assessments for the three years mentioned. He consulted Mr. Mackie-Robertson, a Senior Counsel, who drafted a pro forma memorandum of appeal. It is conceded, and Mr. Akram also frankly admits it in his affidavit, that a mistake was made in not filing a separate memorandum of appeal in respect of each assessment; further, that in the light of the course taken in *Robson and another v. Commissioner of Income Tax,* [1968] E.A. 415, Mr. Akram on May 30, 1968, filed only a single memorandum of appeal. He informed the applicants as appellants that their instructions to appeal had been complied with as he then believed to be the case.

The *Robson* appeals were heard and determined by Harris, J. On May 24, 1968, the learned judge began his judgment by saying, at p. 417:

> "These two appeals were heard together, the questions of fact and of law which arise being common to both. Strictly speaking it would appear that possibly, since each appellant is challenging three separate assessments against himself, there should have been no less than six appeals in all, but the multiplicity of proceedings and general inconvenience which would have resulted from the adoption of this course were avoided by reason of the respondent, the Commissioner of Income Tax, through his counsel, agreeing, subject to approval of the court, to waive any technical objection which he might have taken in that regard. The court has no hesitation in expressing its approval of such waiver."

During the course of my ruling delivered in appeals 61 and 62 (*supra*) I also said that in the particular circumstances of these two appeals strict adherence to procedural requirements would only have produced a multiplicity of appeals without any advantage of a saving in time or costs. It is a poor consolation for the applicants, but that still remains my opinion.

Was it reasonable for the advocate to assume or expect that the respondent would waive the objection in this instance also. Should he not, this is the hardest part, have woken up and immediately applied for extension of time upon reading the respondent's statement of facts filed in answer to the memorandum of appeal, and which clearly stated the respondent would object, as he did, that the appeals were invalid and incompetent by reason of joinder of appeals covering three separate matters in one appeal when three separate appeals should have been lodged. If an application for extension of time had been immediately made then possibly the respondent might have been more generously disposed. The court too would have had less to ponder over.

In favour of the advocate it might be stated that in addition to the *Robson* appeals, the respondent had generously waived the same objection previously in the two cases No. 29 and No. 33, 2 E.A.T.C., Part II, at p. 76 and p. 113. As against this on the respondent raising the matter again by way of preliminary objection in case No. 70, 3 E.A.T.C., Part I, p. 102, the court declared the appeal incompetent. Mr. Mackie-Robertson said although one could say the advocate was in error it was an error anyone could have fallen into unless he is in income tax practice. Hardly so. If it is an excuse at all, an advocate who accepts an income tax brief must be deemed to know the income tax law. He might even be deemed to be in income tax practice.

There was negligence on the part of the advocate but it was continuing negligence which started with the filing of a single memorandum of appeal in the first instance. Notwithstanding the respondent's statement of facts, and,

in view of the turn which events took in the *Robson* appeals, possibly because of it, nothing else startling really happened. The mistake continued but I think in the honest belief that there was no error, and, if separate memoranda were required, the respondent in view of his attitude taken a week earlier in the *Robson* appeals, would probably not press the objection. It is an expectation which in the circumstances might very well reasonably have been entertained by the advocate, and it would not be wholly without foundation.

There is no evidence the applicants as appellants were informed of the objection. At least they are not personally to blame, and they would be entitled to think their appeals were being prosecuted competently.

In a revenue case, unless circumstances absolutely so require, the court should be very hesitant in exercising its discretion in a manner which will result in the taxpayer being deprived of his right of appeal conferred by statute. Appeal is a legal right which is not to be taken away except in the clearest of cases.

In the circumstances of this case, a legal adviser's mistake being capable of constituting reasonable cause, the applicants' own personal conduct being clearly blameless and also there being nothing intrinsically inexcusable insofar as both the advocate and the applicants are concerned, the delay being an integral part of the original mistake, it does not merit a refusal of these applications which will result in a denial of the applicants' right of appeal. In my opinion the court's discretion ought to be exercised, and, accordingly, the time for the filing of appeals will be enlarged by ten days.

The applicants must pay the respondent's costs.

Order accordingly.

For the appellant:
JA Mackie-Robertson, QC and *SM Akram*
Akram & Esmail, Nairobi

For the respondent:
JM Khaminwa (Counsel to the East African Community)
Counsel to the East African Community, Nairobi

Coca-Cola Export Corporation v Registrar of Trade Marks
[1969] 1 EA 677 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	11 July 1969
Case Number:	1/1969 (113/69)
Before:	Biron Ag CJ
Sourced by:	LawAfrica

[1] Trade Marks – Registration – Burden of proof – Onus is on applicant.

[2] Trade Marks – Registration – Word – Reference to character or quality of goods – "Splash" not registrable for beverage – Trade Marks Ordinance (*Cap.* 394), *s.*12 (1) (*d*) (*T*.).

[3] Trade Marks – Registration – Word – Reference to character or quality of goods – Test – Reaction of section of public likely to buy or deal with goods in question.

Editor's Summary

The Registrar of Trade Marks refused the appellant's application to register the word "Splash" in Part A of the Trade Marks Register in respect of a beverage on the ground that the word had direct reference to the character or quality of the goods and therefore was not registrable under s. 12 (1) (*d*) of the Trade Marks Ordinance. The appellant appealed to the High Court.

Held –

(i) the onus of satisfying the Tribunal that the word in question is suitable for registration is on the applicant (*J. P. Coats Ltd*. (4) adopted);

(ii) it is the reaction of that section of the public which is likely to buy, or deal with, the beverage in question which is to be considered (*Linotype Case* (1), *Keystone Knitting Mills Ltd*. (2) and *R. K. Dundas Ltd*. (3) adopted);

(iii) the appellant had failed to discharge the onus of showing that the word was suitable for registration.

Appeal dismissed.

Cases referred to in judgment:

(1) *The Linotype Case* (1897), 14 R.P.C. 900.

(2) *Keystone Knitting Mills Ltd*. (1928), 45 R.P.C. 421.

(3) *R. K. Dundas Ltd*. (1955), 72 R.P.C. 151.

(4) *J. P. Coats Ltd*. (1936), 53 R.P.C. 355.

Judgment

Biron Ag CJ: This is an appeal from the rejection by the Registrar of Trade Marks of the appellant company's application to register in Part A of the Trade Marks Register the word "SPLASH" in respect of a beverage which comes within Class 32 of Schedule 111 of the Trade Marks Ordinance (Cap. 394, Revised Laws), hereinafter referred to as the Ordinance, and which class comprises:

> "beer, ale and porter; mineral and aerated waters and other non-alcoholic drinks; syrups and other preparations for making beverages."

Strangely enough the beverage, the subject matter of the application, is not specifically described in the proceedings, nor was it described by learned counsel who appeared at the hearing of this appeal. I can therefore only assume that it is some type of beverage which the appellant company wishes to market in this country.

It is common ground that the case turns on the construction and application of s. 12 (1) (*d*) of the Ordinance, which reads as follows:

> "(1) In order for a trade mark (other than a certification trade mark) to be registrable in Part A of the register, it must contain or consist of at least one of the following essential particulars:
>
> (*d*) a word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname;
>
> (*e*) any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the foregoing paragraphs (*a*), (*b*), (*c*) and (*d*), shall not be registrable under the provisions of this paragraph except upon evidence of its distinctiveness."

Although, as agreed by both sides, sub-paragraph (*d*) must be read in conjunction with sub-paragraph (*e*), that the word mark must be distinctive, that aspect does not, to my mind, present any difficulty. As remarked, the whole case turns on the construction and application of sub-paragraph (*d*).

In his "Grounds of and Material Used in Arriving at Decision" submitted under r. 34 of the Trade Marks Rules 1968, hereinafter referred to as the decision, the learned Registrar went into the matter with commendable thoroughness, directing himself, *inter alia*, on the dictionary definitions of the word "Splash" and also on the cases cited in Kerly's Law of Trade Marks and Trade Names (9th Edn.). With regard to the dictionary definitions, he set out in full the definitions given of the word in Webster's Third New International Dictionary, presenting sixteen meanings, and also those in the Shorter Oxford English Dictionary. And the learned Registrar concluded his decision with:

> "Accordingly I have come to the conclusion that the word mark herein has a direct reference to the character or quality of the goods for which protection is sought and is not, therefore, registrable as desired by the applicant."

The grounds of appeal as laid in the memorandum of appeal are that:

1. The learned Registrar erred in holding that the word "SPLASH" is not registrable in Class 32 (Sch. 111) in terms of section 12 (1) (*d*) of the Trade Marks Ordinance (Cap. 394) on the ground that the said word has direct reference to the character or quality of the goods and that the word might become common to the trade in future.
2. The learned Registrar failed to exercise his discretion in accordance with judicial principles in holding impliedly that the use of the word mark "SPLASH" would convey to the members of public in Tanzania who buy the goods in question, a direct reference to the character or quality of the goods.
3. The learned Registrar has failed to appreciate correctly the ratio of the authorities which he has cited and has given undue weight to the various dictionary meanings to which he has referred and on which he has relied in coming to his conclusion.
4. Wherefore the appellant prays that the decision of the learned Registrar be set aside and that he be ordered to register this mark as applied for.

In arguing this appeal, Mr. N. M. Patel, for the appellant company, cited many cases on the corresponding provisions in the English Trade Marks Act 1938 and its predecessors which it replaced. Mr. Rajani, who appeared for the Registrar, likewise cited authorities. I will, I hope, be forgiven if I do not refer

to them all, though I assure learned counsel that I have duly perused them. For as remarked by the learned Registrar in his decision, quoting from Kerly's Law of Trade Marks (9th Edn.), p. 248, on the assistance to be derived from such cases:

> "few of them are of value as laying down any definite principle; nor would they seem to imply any very consistent practice."

I would go even further and say on my view of the cases, that they seem to be more remarkable for their inconsistency than consistency. Further, as submitted by Mr. Patel, and this is his main ground of appeal, it would not be right to import into this country the English meaning of the word "Splash", particularly the dictionary definitions, as Mr. Patel submits that less than 1 per cent of the inhabitants of this country speak English. In this respect it is not irrelevant to note one of the dictionary meanings quoted by the learned Registrar from Webster's Dictionary, as to the meaning of the word is:

> "(British): a small amount of Soda Water (Scotch and a splash)."

It will not, I think, be disputed that there are very few persons in this country who would be aware of this meaning of the word "Splash". Though, in fairness to the Registrar, he did direct himself in his decision that:

> "The real question, therefore, is whether on the whole, having regard to the impression which the mark, when used in relation to the goods in question, would convey to those members of public in Tanzania who buy the goods a direct reference to the character or quality of the goods."

I must confess that I find the issue before the court extremely difficult. As remarked, the cases cited by learned counsel are to my mind more remarkable for their inconsistency than their value in deriving therefrom general principles. As stated in Kerly's authoritative book above referred to:

> "One reason may lie in this, that almost every immediately attractive trade mark is, in some sense, descriptive or laudatory of the goods and so in some degree has reference to their character or quality. The difficulty is to decide whether that reference is a direct reference: at best a somewhat metaphorical question and one depending ultimately upon the reaction of the public to the chosen word."

I propose to adopt Kerly's directive and examine and consider, as well as I can, the reaction of the public to the chosen word, but first I find it necessary to set out the principles and considerations I intend to apply.

If I were dealing with the English public, I would not have the slightest hesitation in agreeing with the learned Registrar that the word "Splash" has a direct reference to the character of the beverage. On the other hand, if I were to take as a criterion the reaction of the general public of this country to the word "Splash", as I think contended for by Mr. Patel, I would have even less hesitation in holding that to an ordinary member of the public, the word would not have the slightest, let alone direct, reference to the character of the goods, the subject matter of this case. However, I propose to steer, as it were, a middle course and consider the reaction, not of the public at large, to the word, but to that section of the public which is likely to buy, or deal with, the beverage in question. I am fortified in my so restricting, the public by dicta in the very cases cited by Mr. Patel himself. Thus in the *Linotype Case* (1897), 14 R.P.C. 900, Kekewich, J., said (at p. 902):

> "In considering the question whether a particular word has reference to the character or quality of the goods, one must not regard the word from

> an etymological point of view, such as the point from which a man of high education would regard it, but from the ordinary point of view which would be taken by the ordinary British subject dealing with the particular goods."

Also in *Keystone Knitting Mills Ltd*. (1928), 45 R.P.C. 421, Lord Hanworth, M.R., said (at p. 426):

> "I think one has to look at the word which is registered, not in its strict grammatical significance, but as it would represent itself to the public at large who are to look at it and to form an opinion as to what it connotes."

Again in the case of *R. K. Dundas Ltd*. (1955), 72 R.P.C. 151, Lloyd-Jacob, J., said (at p. 156):

> "But in the view I take of the matter the question which has to be asked is this: On a fair and reasonable view of what will happen in the normal circumstances of trade, will the attribution alleged naturally occur to the persons to whom the mark will have an appeal?"

I am, therefore, for better or worse, confining myself to considering the reaction of, or the impact the word "Splash" will have on, that section of the public which will deal with, or is likely to use, the beverage so named. On this aspect Mr. Rajani's submission that the word "Splash" has an onomatopoeic quality is, I feel, irresistible, as the word does conjure up a beverage, or some type of liquid, particularly if aerated, even to one who is not particularly familiar with English.

As indicated, I find the issue in this case far from easy to resolve. Whilst I approach the question freely, i.e. in no way fettered by the finding of the learned Registrar, as I consider that this court is entitled to apply and use its own discretion, just as was the Registrar himself in the first instance, even so, in coming to a decision, I do so having regard to the burden of proof, which I hold is on the appellant company, as stated by Luxmoore, J., in *J. P. Coats Ltd*. (1936), 53 R.P.C. 355, at p. 367, that:

> "The onus of satisfying the Tribunal that the word in question is suitable for registration is on the applicant."

On due consideration of all the available material and the authorities, I find the issue to be evenly balanced. Were the onus on the Registrar to satisfy the court that the word mark is not suitable for registration, I could not, in conscience, have agreed with him, but as the onus is on the appellant company to satisfy the court, that the word mark applied for is suitable for registration, I do not feel that the appellant company has discharged such onus and has persuaded the court that it is suitable for registration.

In the result, for the reasons I have attempted to set out, the appeal is dismissed and the decision of the Registrar is upheld.

In the peculiar circumstances of this case, I consider it proper to make no order as to costs, but should learned counsel for the Registrar wish to press for costs, I am quite prepared to hear counsel in such respect.

Appeal dismissed.

For the appellant:
N Patel
Donaldson & Wood, Dar-es-Salaam

For the respondent:
SH Rajani (Assistant Registrar of Trade Marks, Tanzania)

Commissioner of Income Tax v Hutchings Biemer Ltd

[1969] 1 EA 681 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	7 July 1969
Case Number:	43/1968 (114/69)
Before:	Sir Charles Newbold P, Duffus V-P and Law JA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Dalton, J

[1] Income Tax – Deductions – In computing profits – Expenditure incurred in litigation to recover possession of property – Object to earn higher income from rents – Whether expenditure incurred in the production of income – East African Income Tax (*Management*) *Act* 1958, *ss.* 14 *and* 15.

Editor's Summary

A large part of the respondent taxpayer's income consisted of rents of property owned by it, including warehouses and godowns. In 1964 and 1965 the respondent attempted by court action to recover possession of two godowns from tenants who refused to quit. A higher rent could thereafter have been obtained from other tenants. The litigation ended unfavourably for the respondent, which had to pay its own and the tenants' legal costs. The respondent claimed to deduct these costs as "expenditure wholly and exclusively incurred in the production of income". The High Court found in favour of the respondent, holding that this expenditure on litigation was properly attributable to revenue and not to acquiring a capital asset or an enduring advantage.

The Commissioner appealed.

Held –

(i) the expenditure was not for the purpose of bringing a capital asset into existence but for the purpose of increasing the revenue to be obtained from rents;

(ii) accordingly the expenditure was deductible under s. 14 of the Act.

Appeal dismissed.

Cases referred to in judgment:

(1) *The Commissioner of Income Tax v. Buhemba Mines Ltd*., [1957] E.A. 589; 2 E.A.T.C. 333.

(2) *The Commissioner of Income Tax v. Overland Co. Ltd*., [1961] E.A. 729; 3 E.A.T.C. 307.

(3) *Vallombrosa Rubber Co. Ltd. v. Farmer* (*Surveyor of Taxes*) (1910), 5 T.C. 529.

(4) *The Commissioner of Inland Revenue v. Adam* (1928), 14 T.C. 34.

(5) *Southern v. Borax Consolidated Ltd*. (1940), 23 T.C. 597.

(6) *Atherton v. British Insulated & Helsby Cables Ltd*. (1925), 10 T.C. 155.

July 7, 1969. The following ex tempore judgments were delivered:

Judgment

Law JA: This is an appeal by the Commissioner of Income Tax from a judgment of the High Court of Kenya allowing an appeal by a taxpayer, the present respondent, against an assessment to tax for the year of income 1965. The taxpayer is a company carrying on business as furniture makers and upholsterers, in addition to which it receives income by way of rent from property

belonging to it, including warehouses and godowns. There was evidence that not less than half the taxpayer's income consists of such rents. The taxpayer was assessed to Shs. 18,120/- corporation tax in respect of its rental income of £2,416 in the year of income 1965. In 1964 and 1965 the taxpayer was engaged in litigation with one of its tenants. It sought to recover possession of two godowns, of which it was at all material time the owner, the tenants having refused to quit although served with notice to quit. Possession was required, and this is not disputed, because a higher rent could have been obtained from other tenants in the conditions then obtaining. This litigation ended unfavourably for the taxpayer, who in 1965 had to pay its own costs and the tenants' costs to the tune of Shs. 95,671/-. The taxpayer objected to its assessment to tax on the grounds that its expenditure on litigation was expenditure wholly and exclusively incurred in the production of income and was therefore deductible expenditure against tax under s. 14 of the Income Tax (Management) Act 1958. The Commissioner of Income Tax refused to amend the assessment, maintaining that the expenditure was capital expenditure the deduction of which was not allowable under s. 15 of the Act. The learned judge in a carefully considered judgment found in favour of the taxpayer; he held that the expenditure was incurred in bona fide litigation proceedings to regain premises belonging to the company from a tenant and that this expenditure was properly attributable to revenue as the taxpayer was not, in the judge's opinion, acquiring a capital asset or an enduring advantage.

Now Mr. Lutta, for the appellant Commissioner, has submitted that the learned judge was wrong in five respects, the effect of the five grounds of appeal being that the judge should have held that the expenditure was of a capital nature for which no deduction was allowable under s. 14 of the Act. He should, in Mr. Lutta's submission, have found that it was capital expenditure and not revenue expenditure solely and exclusively incurred for the production of income. Mr. Lutta pointed out that legal expenses do not appear amongst the items of deductible expenditure in s. 14 (2) of the Act and he submitted that this expenditure had not been directly, wholly and exclusively incurred in producing income and in this respect he relied on the judgments of this court in *The Commissioner of Income Tax v. Buhemba Mines*, 2 E.A.T.C. 333, and *The Commissioner of Income Tax v. Overland Co. Ltd.*, 3 E.A.T.C. 307.

Where to draw the line in deciding whether any particular item of expenditure is capital or revenue expenditure is not always easy. The subject has been discussed in various cases and in particular Mr. Lutta referred us to the tests laid down in *Vallombrosa Rubber Co. Ltd. v. Farmer* (*Surveyor of Taxes*), 5 T.C. 529 and *The Commissioner of Inland Revenue v. Adam*, 14 T.C. 34. The test in the *Vallombrosa* case is, was it expenditure made once and for all to bring into existence an asset or an advantage of a capital nature, or was it year by year expenditure to maintain an existing asset, in which case the expenditure is of a revenue nature? In the *Adam* case the test was defined as follows: "Are the sums in question part of the trader's working expenses, are they expenditure laid out as part of the process of profit earning, or on the other hand, are they capital outlays, are they expenditure necessary for the acquisition of property or of rights of a permanent character, the possession of which is a condition of carrying on the trade at all?" Mr. Lutta has submitted that the expenditure here was made to bring into existence an advantage of lasting benefit to the taxpayer, that is to say, vacant possession of the godowns, and that it should be treated as capital expenditure.

I have listened carefully to Mr. Lutta's attractive argument but after careful consideration I find myself in general agreement with the judgment of the court below having regard to the particular facts of the case now before us. The taxpayer's expenditure on litigation which he seeks to deduct was not,

in my view, made with the object of bringing into existence a new capital asset. It was expenditure of the type commonly incurred by a landlord whose business is leasing property and receiving rents and who wishes to regain possession of a property from a tenant with a view to making more advantageous use of it.

There was some evidence in this particular case that this was not a "once and for all" payment so far as the respondent is concerned but one of a recurring nature as one would expect in the case of a business consisting of letting property. Had the litigation succeeded no alteration would have been made to the taxpayer's fixed capital assets but its revenue from rent would have increased, and on that increased revenue the taxpayer would have paid more tax, and to me this is a strong indication that the expenditure was of a revenue nature. In the words of Lawrence, J. (as he then was) in *Southern v. Borax Consolidated Ltd*., 23 T.C. 597, it was expenditure "incurred in the ordinary course of maintaining the assets of the company" and was thus wholly, exclusively and directly laid out for the purposes of the company's trade in order to earn revenue. In my view, the position in this appeal is analogous, and I would dismiss the appeal.

Duffus V-P: It appears from the record that a major portion of the business of the respondent company was the letting of properties. Any expenditure properly incurred in the obtaining of rentals must be allowable as expenditure incurred in the production of that income, for example the cost of distraining for arrears of rent or bringing an action to recover arrears is clearly deductible, and it does appear to me that in some cases an action to recover possession of premises may be regarded as a proper expenditure in the running of a business concerned with the rental of premises.

In this case, the sole purpose of these proceedings was to regain possession so as to obtain a higher rent. It is not in dispute that at the time a much higher rental could be obtained. In my view the learned judge was justified in finding, as he did, in his judgment – and I quote:

> "I do not consider that this was an expenditure designed to improve the capital position of the appellant company or the creation of a new asset; in my view this expenditure was expenditure essential to the earning of profit, that it was incurred for the direct purpose of producing profit."

I agree, therefore, with Law, J.A., that the learned judge was justified in his decision and that this appeal should be dismissed.

Sir Charles Newbold P: The question for decision by this court is whether expenditure incurred by a taxpayer in the recovery of premises, which premises, as part of his business, were let, is expenditure wholly and exclusively incurred by him in the production of his income. As I have stated, the business of the taxpayer comprised in part the letting of premises, which premises produced income for him. The taxpayer has urged, and the trial judge has held, that that expenditure was expenditure incurred by the taxpayer wholly and exclusively in the production of his income. The Commissioner has appealed and Mr. Lutta has placed before us a very attractive argument. He has submitted, first, that the proper construction of these words "wholly and exclusively" incurred in the production of income have already been determined by this court, particularly in the *Buhemba* case where, in the words of Forbes, J.A., which words were agreed to by the other members of the court, it was said:

> "In the *Ward* case the Judicial Committee held that the words of the New Zealand Act meant that an expense to be deductible 'must have been incurred for the *direct* purpose of producing profits' and I am of the opinion that the same meaning must be attached to the words used in the East African Act."

I would agree with Mr. Lutta entirely that before any expenditure can be deducted it must be incurred for the direct purpose of producing profits and it is in that sense that the words in s. 14 (1) of the Act should be construed. Having accepted that that is the law to be applied, one has then got to ascertain whether the facts of the particular case are such as to show that the expenditure was incurred for the direct purpose of producing profits. As Cave, L.C., said in *Atherton v. British Insulated & Helsby Cables Ltd*., 10 T.C. 155, at p. 192: ". . . in other words, whether it is in substance a revenue or a capital expenditure. This appears to me to be a question of fact. . . ." I agree with him that whether the expenditure was incurred for the direct purpose of producing profits and consequently is expenditure wholly and exclusively incurred in the production of income is, once the legal principles have been ascertained, a question of fact.

Now in this case it seems to me that where the business of the taxpayer consists in the utilisation of an existing asset by letting it out, or handing over to someone else the possession of the asset, by reason of which the person who acquires the possession of the asset pays to the owner thereof a sum, whether it be in the form of rental or of part payment towards an ultimate acquisition of the asset under a hire purchase scheme, the expenditure incurred by the owner of any such business in the recovery of the asset is an expenditure incurred directly for the purpose of producing the profits resulting from the asset. It makes no difference in my view whether the owner of the asset incurs that expenditure in order to obtain a larger income from someone else, or whether he incurs that expenditure because the person in whose possession the asset was had defaulted in the payment of the dues which he had to pay, or whether those dues were dues under a hire purchase scheme or dues under rental. In each case it seems to me that that expenditure – which may never, in fact, be incurred – is expenditure which is a necessary concomitant to the broad enterprise which results in the acquisition of the income. I, personally, can see no answer to that question other than that the expenditure incurred for the recovery of the asset is an expenditure incurred for the direct purpose of producing profits, that is the profits which the asset itself produces. Mr. Lutta has referred to the famous words of Cave, L.C., in the *Atherton* case, words which have been repeated several times by this court in determining this matter, which words were:

> "But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

Mr. Lutta stressed that what the expenditure in this case brought into existence an advantage by reason of the fact that the recovery of possession of the premises was an advantage. That is true in one sense; but strictly the advantage was always in existence. There was nothing new which was brought into existence, it was merely a new form of utilisation of an existing asset. I consider that whether that asset is used in one form, or another, any expenditure which is necessary for a transfer of use will be revenue expenditure unless the nature of the asset is completely changed. I confess that I cannot see how the acquiring of possession of this asset is a creation of any new asset or new advantage in the company's business. I am quite sure that if we were to look at the balance sheet of the company you would see on the assets side no new asset at all. It would be precisely the same as that which existed in the past. In my view the repossession is merely a means of utilising the existing asset to better advantage; and that is nothing other than saying that the asset has been utilised so as to acquire greater profits. In the result, therefore, what has happened is that this

expenditure has been incurred in order to utilise an existing asset for the direct purpose of producing better profits. In those circumstances it seems to me that this expenditure comes right within the words of s. 14 (1) as interpreted in the *Buhemba* case. I agree with the judgments of my brethren.

Accordingly the appeal is dismissed.

Appeal dismissed with costs.

For the appellant:
BCW Lutta (Counsel to the East African Community) and *RO Kwach*
The Counsel to the East African Community, Nairobi

For the respondent:
Sir William Lindsay
Hamilton, Harrison & Mathews, Nairobi

Commissioner-General of Income Tax v Noorani
[1969] 1 EA 685 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	24 July 1969
Case Number:	29/1969 (116/69)
Before:	Sir Charles Newbold P, Duffus V-P and Law JA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanzania – Platt, J

[1] Income Tax – Residence – Individual – Whether taxpayer had a home in the Territories – East African Income Tax (*Management*) *Act* 1958, *s.* 2 (i) (*a*).

Editor's Summary

The appellant appealed from a decision of the High Court holding that the taxpayer was resident in East Africa from 1962 to 1965. The facts are fully set out in the judgment of Duffus, V.-P. The issue was whether the taxpayer had a home in any of the Territories for the years in question.

Held –

(i) a home is a dwelling-house which for at least a portion of the year was available to the taxpayer and which was kept for the purpose of his use as a dwelling;

(ii) the home did not have to be occupied during every year for the taxpayer to have a home in the

Territories;

(iii) a person may have two or more homes at the same time.

Observations by Sir Charles Newbold, P., on the manner in which the Commissioner may determine that temporary absences are reasonable.

Appeal dismissed.

No cases referred to in judgment

July 24, 1969. The following ex tempore judgments were delivered:

Judgment

Duffus V-P: This appeal concerns the assessment of the respondent's income tax for the years 1962, 1963, 1964 and 1965. The Commissioner-General of Income Tax assessed the tax on the basis that the respondent was not resident in East Africa. On appeal to the Local Committee it was held that the respondent

was a resident in East Africa. The matter went on appeal to the High Court and in a fully considered judgment the learned judge upheld the decision of the Local Committee. The matter now comes on appeal to us.

The issue in this case is on one point only and that is whether the respondent is resident in the Territories within the meaning of the East African Income Tax (Management) Act 1958. The particular portion of the Act which has to be interpreted is whether he was resident in the Territories as appears in s. 2 of the Act. The relevant portion of this section reads as follows:

> " '. . . resident in the Territories', when applied in relation to any year of income –
>
> (1) to an individual, means that such individual resides, except for such temporary absences as the Commissioner may determine to be reasonable, in any of the Territories; and an individual shall be deemed to reside in the Territories if he –
>
> (*a*) has a home in any of the Territories and was present in the Territories for any period in such year of income."

The particular issue in this case is whether the respondent had a home in any of the Territories for any of the years in question. The facts relevant to this appeal show that the respondent was born in Mombasa in Kenya and that after being educated abroad he was employed and had various businesses and lived in Tanga in Tanzania from 1932 up to 1960 when he went to Europe. He went to Europe for the reasons which the learned judge has fully dealt with but these were mainly for the purpose of medical treatment and for the purpose of putting his children to school. He bought a house in England in 1960 and then in 1962 he returned to East Africa, on December 22, 1962, and stayed until February 14, 1963, when he returned to England. He again returned to East Africa on September 20, 1964, and stayed until November 12, 1964, when again he returned to England, returning to East Africa on May 22, 1965, and again returning to England on July 9, 1965. He also spent periods in East Africa in the years 1966 and 1967 and finally returned to reside in Mombasa, Kenya, on January 6, 1968. He sold his house in England and currently has no connection with the U.K. The learned judge also found that when he went to England he kept the various properties that he owned in East Africa, both in Tanga and in Mombasa; kept his investments here and he also kept his bank account. It also appears that he became a Kenya citizen in 1964 and previous to that he had held a passport as a British protected person and he had also obtained a certificate for permanent residence in Kenya in 1963.

The question here is the meaning to be placed on the words "has a home in any of the Territories". Learned counsel for the respondent raised the question that this was a matter of fact on which an appeal would not lie but this really depends on the facts of each case as an appeal does lie to this court to decide as a matter of law whether the learned judge was justified, on the facts which were proved before him, in coming to the decision that he did. A "home" is not defined in the law and clearly it is not capable of precise definition and must depend upon the peculiar circumstances and facts of each particular case. It is clear, however, that a person can have more than one home at the same time, if he has homes in different countries, and then in my view "home" must mean a dwelling-house in the sense that it is a place in which one lives and for this purpose may only amount to a single room.

I also agree with the view expressed by the learned judge that "home" must be a place which, for at least a portion of the tax year in question, was available to the taxpayer, whether he was in this country or not, and was kept for the purpose of his use as a dwelling and was also a place over which he, at the

particular time, exercised full control. In this case, in each of the particular years in question, the respondent was present in the Territories for a portion of that year and the whole question turns on whether or not the judge, on the evidence before him, was justified in finding that the respondent had a home in the Territories in each of those years. This, as I have said, is a question of fact and in the circumstances of this case, especially the fact that the taxpayer was born and was resident in East Africa up to 1960, when he left, and as the learned judge found had only left on a temporary basis and intended to return to East Africa, and that his absence from East Africa was to enable him to have medical treatment and for the purpose of putting his children into school. There is also the fact that he maintained all his material interests in East Africa in that he kept his houses, including a house and a guest-house in Tanga, plus another in Mombasa and he kept his bank account and his investments here. With these circumstances as a background I would mention each of the particular set of facts that were found to exist in each year.

In 1962 and 1963 the learned judge found that the respondent had a home in East Africa in that he took back the guest-house which was attached to his dwelling-house in Tanga; that is to say, the dwelling-house in which he resided before he left in 1960. The evidence shows that he rented out the whole house, including the guest-house, in 1960, but that he took back or retained the guest-house in 1962 and as the learned judge found, furnished it and always had it available to him in the years 1962 and 1963; and that he occupied it for some time during those years, and also had a servant in attendance. The learned judge was satisfied that these circumstances, together with the other circumstances I mentioned were sufficient, in his view, to come to the finding that this guest-house was a home within the meaning of the law, in the years 1962 and 1963.

The same thing applied in 1964, except that for a portion only of that year he occupied the whole house. In so far as 1965 is concerned, the evidence which the learned judge accepted is that the respondent reserved a flat in his place in Mombasa for the purpose of staying there when he came to East Africa, and he furnished this for that purpose and that he stayed there in 1965. In addition to this there was the fact that the respondent became a Kenya citizen in 1964 and also that, during the year 1963, he had obtained a certificate for permanent residence in Kenya.

These are the facts on which the learned judge came to the conclusion that the respondent resided in the Territories and that he should be treated as such for his income tax assessments. Learned counsel for the appellant, Mr. Khaminwa, has attacked this finding and I think, quite rightly, has asked us to deal with it on the facts of this case. In my view on these facts there can be no doubt at all that the learned judge was fully justified in finding that the respondent was a resident in the Territories in each of these years. I would therefore dismiss the appeal.

Law JA: I agree that the question whether, on any proved or admitted facts, the existence of a “home” has been established, is one of mixed fact and law, and that this appeal is accordingly not barred by the provisions of s. 113 (*h*) of the East African Income Tax (Management) Act 1958.

When considering, for the purpose of determining whether a person has “a home” in the Territories within the meaning of the income tax legislation, I am of the opinion that the correct approach, in the case of a person like the respondent who was born and has spent all his working life in East Africa, is to consider whether he has ever ceased to have a home in East Africa. The fact that he may have leased the house which was his home to a tenant does not,

in my view, necessarily take away from that house its character of a home, even though on the owner's occasional annual visits the house may not always be available for his occupation. It may, according to the circumstances, still remain his home. It should be noted that the definition of "resident in the Territories" in s. 2(1) of the Act involves in para. (*a*) two ingredients: the existence of a home and actual presence in the Territories. Unlike rent restriction legislation this definition does not require that the home be personally occupied or even that it be available for occupation by the taxpayer.

In the case now under consideration I consider, notwithstanding Mr. Khaminwa's persuasive argument, that on the facts, as a matter of common sense, it was established that the respondent had at all material times a home in Tanga. I consider that Platt, J., came to a correct conclusion in this respect and I agree with the learned Vice-President that this appeal should be dismissed.

Sir Charles Newbold P: The issue on this appeal is whether the respondent was resident in the Territories within the meaning of the definition of that phrase as it occurs in the East African Income Tax (Management) Act 1958. In the determination of that issue only a part of the definition of the phrase has been considered, that part being para. (*a*) which states that a person will be deemed to be resident "if he has a home in any of the Territories and was present in the Territories for any period" in any such year of income. That is the only part of the definition which has been considered by the trial judge in arriving at his decision and the only part which has been presented to us for consideration on this appeal, the question being solely whether the respondent, on the particular facts of this case, had a home. I mention this because for one reason or another the first part of the definition has not been referred to and it seems to have been accepted that it does not apply. Why, I am not quite clear, unless it is because there is some reference to "such temporary absences as the Commissioner may determine to be reasonable". May I say what I think I have previously said: that the first part of the definition is taken to deal with the normal position, that is with circumstances in which normally a person would be said to be resident. The mere fact that the first part refers to such temporary absence as the Commissioner may determine to be reasonable does not mean that it lies within the power of the Commissioner to exclude the first part merely by refusing to deem an absence reasonable. This is a power which he has to exercise judicially and reasonably in the circumstances of the case. The mere fact that he has not exercised it, or that he has exercised it unreasonably or in judicially, does not exclude the first part of the definition from applying to the facts of any particular case. I mention this solely for the reason that it may be that there would be no necessity at all to consider the deeming provisions in this case. This case, however, has been argued purely on the deeming provisions. I shall deal with it on that basis but with this proviso, that this does not mean that the first part of the definition may not equally have had the same result.

In arriving at the determination of the issue whether the respondent had a home in any of the Territories this, in my view and in the view of my brethren as already expressed, is clearly a mixed question of fact and law. What is a home, that is, what are the elements which are necessary to constitute a home for the purposes of this definition, is a question of law; whether the facts of the particular case satisfy these elements is a question of fact. Jointly the issue as a whole is a question of mixed fact and law. Thus under the provisions of s. 113 an appeal lies and I agree with my brethren in rejecting the first submission that an appeal does not lie.

I should also like to get out of the way one or two matters. The first is whether a person can have two homes. Mr. Khaminwa has not disputed, and I am sure

Mr. Inamdar will accept the proposition, that it is possible for a person to have two, and indeed possibly more, homes at the same time. Thus the fact that during the relevant years the respondent had a home, a fact which appears to have been accepted by all parties, in England does not mean that he did not and could not at the same time have a home in East Africa. The next matter which I would like to get out of the way is the factors which the trial judge considered in coming to the conclusion that in each of the relevant years the respondent did have a home in the Territories. Mr. Khaminwa has urged, at least I think he has urged, that the trial judge wrongly considered certain factors in coming to his conclusion. If I understood Mr. Khaminwa correctly, he submitted that the trial judge was wrong in considering factors such as the birth, citizenship and business interests of the respondent in arriving at his conclusion as to the existence of a home in the Territories. I find myself unable to accept that submission. All of these facts are, I think, relevant in coming to the conclusion as to whether a dwelling-house constitutes a home. They are none of them individually conclusive. But it is obvious that one is more inclined to accept that a dwelling-house, situated in the country in which a person was born and has always lived and has all his business interests, is his home rather than a dwelling-house situated in a country which he has only visited for specific purposes and in which he has no interests or ties. I think that in arriving at his conclusion as to the existence of a home the trial judge was completely correct in considering all the matters which he did in fact consider, that is, birth, citizenship, business interests, investments etc. All these factors must be considered in determining the aspect of the matter which is a question of fact.

Now I will not repeat the various facts which have been dealt with by the Vice-President in his judgment, but I will seek to ascertain whether those facts constitute my conception of the meaning of the word “home” within the terms of the definition which we are considering. During the course of the arguments I attempted to set out in wording a general definition of the meaning of “home”. I noted it during the argument of Mr. Khaminwa and added to or subtracted from it during the argument of Mr. Inamdar. I do not put it forward as an exhaustive definition of “home” because it would be dangerous to do so; but I do suggest it is a definition which might be considered as providing a basis against which the proven facts should be tested for the purpose of determining whether a dwelling-house, which obviously is something separate from a home though it may also be a home, should be regarded as a home. The definition of a home, if I may read from my notes, I would set out as follows. The home of a person is a dwelling place, whether the whole or part of a house or a flat, and whether owned or rented, in which, in the absence of special circumstances, one would expect to find that person’s family, if he has a family, and the personal belongings which he would gather around him to satisfy his tastes and interests. The special circumstances in which one would not find his family or his personal belongings would include temporary separation, even for a relatively long period, for educational, medical or business reasons, and by business reasons I include the necessity of earning a livelihood. There must be a substantial degree of occupation of the dwelling place by the person or a member of his family, but for this purpose the period to be considered during which this occupation must have occurred will vary with the circumstances of the case.

Now I put that forward as containing the elements of what my conception of a home is. Applying the proven facts in this case to that conception of a home, which in my view is a correct interpretation of the word “home” in the definition which we have to consider, I am satisfied that in respect of each of the years in question the respondent had a home in East Africa. I agree that the flat placed at his disposal by his relatives was not a home; and I agree with the trial judge in his conclusion that it was a mere place of residence occupied

by him by courtesy of his relatives. Mr. Khaminwa urged that the same applied to the guest-house, the home in Tanga. I cannot accept that. There may be a very fine distinction between the cases but it is a distinction which goes to the fundamental conception of a home. A home may, as I say, exist in a place which is merely rented and not owned; but it must basically be a place which the person in question is entitled to enter in his own right, although that right may in particular circumstances be suspended for a short while, and not one which he may enter only with the leave or licence of another. Now the flat placed at his disposal by his relatives did not belong to the respondent; he occupied it only by the leave or licence by his relatives and he could be turned out on reasonable notice at any moment. The articles of furniture in the flat, so far as we are aware, were not his and had nothing to do with him; he had never occupied it with his family and, so far as is known, he did not intend to occupy it except in the same way as he would occupy a hotel room for the purpose of convenience during any short stay. Now these facts are very different indeed from the position of the home in Tanga. I would not like to come to the conclusion that the home in Tanga was the guest-house and not the house as a whole, even though the house was rented. But assuming for the moment that it was only the guest-house, and on this I would reserve my views, that guest-house belonged to the respondent and that is a factor to be considered. It was a place which he was entitled to enter without the leave or licence of any other person. It was a place which contained his own furniture and belongings and it formed a part of a building which, until for special reasons there was the departure of himself and his family to the United Kingdom, undoubtedly constituted his home. These factors make a great deal of difference; and those factors, together with the other facts which the trial judge considered, in my view entitled him to come to the conclusion as a matter of fact, in so far as the question involves a question of fact, that this guest-house was the home of the respondent during the first three years. During the fourth year the flat in Mombasa, which the respondent owned and which he specifically set aside for his own purposes while he was in East Africa, equally well constituted a home. This was put beyond doubt subsequently by the arrival of his family and their stay in the owned flat. I have no doubt, though it is only a matter of natural inference, that in that owned flat in Mombasa the respondent had around him all the personal belongings of himself and his family which satisfied his and their tastes and interests; and that is a very major element in the determination as to what is a home.

Having, perhaps a little bravely, attempted a definition, after a consideration of the proven facts in the light of that definition I have come to the conclusion in agreement with my brethren that the trial judge was completely correct in his decision that in each of those years the respondent had a home in East Africa. I would agree, therefore, with the Vice-President that the appeal be dismissed. The appeal, accordingly, is dismissed.

Appeal dismissed.

For the appellant:
JM Khaminwa and *DM Wekesa* (Counsel to the East African Community)
The Counsel to the East African Community, Arusha

For the respondent:
IT Inamdar
Mohammedhussein & Co, Tanga

Zola and another v Ralli Brothers Limited and another

[1969] 1 EA 691 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	31 July 1969
Case Number:	4/1969 (118/69)
Before:	Sir Charles Newbold P, Duffus V-P and Law JA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya at Nairobi – Dalton, J

[1] Civil Practice and Procedure – Representation – Whether plaintiff sought to appear, plead or act for another – Civil Procedure (*Revised*) *Rules* 1948, *O.* 1, *r.* 12 (*K.*).

[2] Civil Practice and Procedure – Summary procedure – Defendant to satisfy the judge "otherwise" that there were triable issues – Civil Procedure (*Revised*) *Rules* 1948, *O.* 35, *r.* 2 (*K.*).

[3] Civil Practice and Procedure – Summary procedure – Leave to defend – Whether claim for contribution against another person entitles defendant to leave to defend – Civil Procedure (*Revised*) *Rules* 1948, *O.* 35, *r.* 2 (*K.*).

[4] Evidence – Affidavit – In support of application for summary judgment – Whether complying with Civil Procedure (*Revised*) *Rules* 1948, *Orders* 18 *and* 35 (*K.*).

[5] Evidence – Affidavit – Defective but not a nullity – Discretion of court to admit affidavit.

Editor's Summary

The respondents had sued the late B. Sirley in the High Court together with two other defendants, claiming payment under a guarantee given by them jointly and severally. On the application of the respondents the High Court gave summary judgment against Mr. Sirley. Appeal was lodged against the judgment, and on Mr. Sirley's death his executors were substituted as appellants. The facts are fully set out in the judgment of Sir Charles Newbold, P. The appellants argued that the affidavit in support of the application failed to comply with Orders 18 and 35, that the provisions of O. 1, r. 12 had not been complied with, and that the defence raised triable issues.

Held –

(i) O. 1, r. 12 was not applicable as neither of the plaintiffs sought to appear, plead or act for the other;

(ii) the affidavit in support of the application complied with O. 35, r. 2 in that it was made by a person who could swear positively to the facts verifying the cause of action;

(iii) the affidavit complied with the requirements of Orders 18 and 35, and if it was merely defective in some respects the trial judge in his discretion could act on it and the court would not interfere with

the exercise of his discretion;

(iv) no affidavit was filed by Mr. Sirley and the words "or otherwise" in O. 35, r. 2 only allows properly admissible means of satisfying the court that there are triable issues (*Mugambi v. Gatururu* (4) approved);

(v) the fact that a defendant might have a claim to contribution against another person did not entitle him to leave to defend.

Appeal dismissed.

Cases referred to in judgment:

(1) *Prabhudas v. Standard Bank Ltd*., [1968] E.A. 670.

(2) *Assanand & Sons v. East African Records*, [1959] E.A. 360.

(3) *Standard Goods Corporation v. Nathu & Co*. (1950), 17 E.A.C.A. 99.

(4) *Mugambi v. Gatururu*, [1967] E.A. 196.

(5) *Dummer v. Brown*, [1953] 1 All E.R. 1158.

July 31, 1969. The following considered judgments were read:

Judgment

Sir Charles Newbold P: This is an appeal against a decision of the High Court made on an application by the plaintiffs in a suit to enter summary judgment under O. 35, r. 2 against Bronislaw Sirley, who was the first of the three defendants in the suit. The High Court granted the application and ordered judgment to be entered against Mr. Sirley. From that decision Mr. Sirley has appealed, but he died before his appeal was heard. On the application of his executors the appeal has been continued in their name.

The facts are that Ralli Brothers Limited (Ralli Bros.) and the Standard Bank Limited (the Standard Bank), the plaintiffs in the suit, in 1964 lent to the T. & T. Sisal Co. Limited (the Sisal Co.) a total sum of £600,000 Stg. (each of the plaintiffs lending £300,000) on the security of a debenture issued by the Sisal Co. for the repayment of the loan, which repayment was jointly and severally guaranteed by Mr. Sirley and the two other defendants. A further sum of £600,000 Stg. was lent by the plaintiffs to the Sisal Co. (£300,000 being lent by each of the plaintiffs) upon the similar security of a second debenture, with a similar guarantee by Mr. Sirley and the two other defendants. Default was made in the payment of the sums due and on December 5, 1966, the plaintiffs, under powers contained in the first and second debentures, appointed a receiver and manager of the property of the Sisal Co. The amount due to the plaintiffs at the date of such appointment was stated to be £1,075,428 0*s*. 3*d*. It was stated in the plaint that no payment had been received by the plaintiffs subsequent to that date and on June 28, 1968, the plaintiffs filed a suit against Mr. Sirley and the other two guarantors asking for judgment against them jointly and severally for the sum of £1,243,609 9*s*. 8*d*. which was stated to be the amount due as at May 31, 1968, together with interest thereon calculated in terms of the debentures.

The second and third defendants were resident outside the jurisdiction and Mr. Sirley filed a defence on July 23, 1968, in which he denied that the sums alleged to have been lent were in fact lent to the Sisal Co. The defence further set out that the appointment of the receiver had been made with the approval of Mr. Sirley under the terms of a new agreement by which the plaintiffs agreed that they would not proceed against Mr. Sirley and his co-guarantors and that the receiver and manager had failed to act properly in the performance of his duty; and Mr. Sirley prayed for the dismissal of the suit or in the alternative for an account. On the same day, that is July 23, 1968, the plaintiffs filed a notice of motion under O. 35, rr. 2 and 3, asking that judgment be entered against Mr. Sirley for the sum claimed in the plaint, together with interest thereon. In support of that application an affidavit was filed by Mr. Harkness, who was the manager of the Standard Bank, in which he stated that he was duly authorised on behalf of the plaintiffs to make the affidavit. The affidavit had annexed to it the debentures together with the letter of demand to the guarantors and in it Mr. Harkness stated that he had verified from the bank records that the amounts stated to have been lent by the plaintiffs to the Sisal Co. were, in fact, credited to the account of the Sisal Co.; that the statements in the plaint relating to the appointment of a receiver, the rate of interest due and the amounts due were true to the best of his knowledge and belief; that the statement in the plaint that no payment had been made to the plaintiffs since

December 5, 1966, was true to the best of his knowledge, belief and information; that Mr. Sirley was truly indebted to the plaintiffs in the sum claimed as a guarantor; that demand had been made to the guarantors, including the appellant; that he was advised by the advocates for the plaintiff and verily believed that Mr. Sirley had no valid defence to the suit; and that to the extent that the statements deposed to were not within his personal knowledge they were based on information acquired by him as an officer of the Standard Bank and on advice received from the plaintiffs and their advocates. In that affidavit Mr. Harkness also stated that Mr. Sirley at no time denied liability but had sought merely for an extension of time to meet the liabilities under the guarantees. At no time did Mr. Sirley file any affidavit in reply though he did take out third party proceedings against the Sisal Co. and the receiver and manager.

When the application to enter summary judgment came before the High Court it was urged by Mr. Sirley that the affidavit in support of the application was unsatisfactory in that it failed to comply with the provisions of O. 18 and O. 35; that the provisions of O. 1, r. 12 had not been complied with; and that the defence had raised triable issues sufficient to satisfy the High Court that summary judgment should not be entered against Mr. Sirley, particularly as he had taken out third party proceedings against the principal debtor and the receiver and manager and because he was only one of three guarantors. The High Court rejected the submissions of Mr. Sirley and made an order entering summary judgment against him for the sum claimed in the plaint, together with interest thereon in accordance with the debenture. On the hearing of the appeal before us, Mr. Salter, on behalf of the appellants, repeated and developed these submissions.

As regards the submission that O. 1, r. 12 had not been complied with, I entirely agree with the trial judge that the rule has no relevance to this case. Neither of the plaintiffs sought “to appear, plead, or act” for the other. The affidavit filed by Mr. Harkness on behalf of both plaintiffs was filed in accordance with O. 35, r. 2, which permits the affidavit in support of the motion to be made by the plaintiff “or by any other person who can swear positively to the facts verifying the cause of action”. It is to be noted that the affidavit could not, of course, have been made by either of the plaintiffs, as they were both companies.

As regards the submission that the affidavit of Mr. Harkness was a nullity because it failed to comply with the provisions of O. 18 and O. 35 and the trial judge should not have acted upon it but should have dismissed the motion, I agree that if the affidavit is a nullity then the trial judge could not act on it and the motion should have been dismissed. As I have said in other cases the courts should hesitate to treat an incorrect or irregular act as a nullity, particularly where the act relates to matters of procedure (see *Prabhudas & Co. v. The Standard Bank Ltd*., [1968] E.A. 670). It was urged that Mr. Harkness could not swear positively to the facts’ verifying the cause of action. It is difficult to envisage, in the circumstances of this case, of a more suitable person to swear the affidavit on behalf of plaintiffs, who could not themselves swear to it, than Mr. Harkness, who was the manager of the Standard Bank, one of the plaintiffs, and who had personal knowledge of at least some of the relevant facts and who would be intimately concerned with the accounts of the parties in the Standard Bank. It is to be noted that according to his affidavit the amounts lent by the plaintiffs were credited to the account of the Sisal Co. in the branch of the Standard Bank of which he was manager. It was also urged that the affidavit did not distinguish clearly between those facts within the knowledge of Mr. Harkness and those facts stated on information and belief, nor did it set out Mr. Harkness’s means of knowledge, nor the grounds for belief on matters

stated on information and belief. I do not agree. There is scarcely an affidavit, or indeed any document, which cannot be criticised. It may be that the affidavit could have been more explicit in certain respects, but there is set out therein the means of knowledge and the grounds of belief and the source of information in respect of each of the matters stated on knowledge, belief or information. I am satisfied that the affidavit complied with the provisions of O. 35 and O. 18 and substantially with the requirements relating to affidavits as set out in the decisions of this court in *Assanand & Sons v. East African Records*, [1959] E.A. 360 and *Standard Goods Corporation v. Nathu & Company* (1950), 17 E.A.C.A. 99, to which we were referred by Mr. Salter. I am also satisfied that there is no reason to hold that the affidavit was a nullity. If it was merely irregular in some respects it was open to the trial judge in his discretion to act upon it. He has done so and I see no reason whatsoever to interfere with the exercise of his discretion.

As regards the submission that triable issues had been raised by the defence and the trial judge should have dismissed the application and given unconditional leave to defend, it is to be noted that Mr. Sirley did not see fit to file an affidavit in reply. Order 35 is intended to enable a plaintiff with a liquidated claim, to which there is clearly no good defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the defendant. If the judge to whom the application is made considers that there is any reasonable ground of defence to the claim the plaintiff is not entitled to summary judgment. The mere right of the defendant to be indemnified by, or to have a claim over against, a third party in respect of the defendant's liability to the plaintiff, or to recover from a third party or from the plaintiff by way of counterclaim, a sum of money which does not directly reduce the liability of the defendant to the plaintiff, does not entitle the defendant to prevent the plaintiff from obtaining a summary judgment. Normally a defendant who wishes to resist the entry of summary judgment should place evidence by way of affidavit before the judge showing some reasonable ground of defence. This is clear from the words of O. 35, r. 2 which state:

> "The court may thereupon, unless the defendant by affidavit, or by his own viva voce evidence or otherwise, shall satisfy it that he has a good defence on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend, pronounce judgment accordingly."

But the words "or otherwise" would enable the judge to consider the pleadings or any other matter properly before him in order to enable him to arrive at a decision on the application. I agree entirely with the words of Madan, J., in *Mugambi v. Gatururu*, [1967] E.A. 196, at p. 197, where he said:

> "In my opinion, therefore, the expression 'or otherwise' in r. 2 entitles a defendant to resist an application for summary judgment in manner other than by affidavit or by his own viva voce evidence but only by properly admissible means. But a method of satisfying the court otherwise than by affidavit or the defendant's own viva voce evidence is not to be encouraged. I would not like to see it gaining ground."

In this case Mr. Salter submits that the statements in the defence that the plaintiffs had not lent the sums in question to the Sisal Co., that there had been a new agreement that the plaintiffs should not proceed against the guarantors during the appointment of the receiver and manager, and that the receiver and manager had failed to act properly in the performance of his duty, raised triable issues. The judge did not consider this to be so as, after referring to the defence and the failure of Mr. Sirley to file an affidavit, he said:

> "Looking at the substance of the matter it seems to me to be plain that

> in truth there is no defence on the issue of the liability of the first defendant as guarantor."

I agree with him. The debentures, which were signed as guarantor by Mr. Sirley, contained an acknowledgment of the liability of the Sisal Co. in respect of the sums lent. While this would be rebuttable by evidence, the mere denial in the defence that the sums were lent would not suffice to raise a triable issue. Similarly, the mere statement in the defence of a new agreement with, be it noted, no particulars as to the parties, the date, the circumstances and the reason for the new agreement, which statement by Mr. Sirley did not see fit to substantiate by affidavit on which he could have been cross-examined, would not suffice to raise a triable issue. Equally, the bare statement in the defence of a failure of duty on the part of the receiver and manager does not suffice to raise a triable issue.

Mr. Salter also submitted that the judge, having regard to the circumstances that there were three guarantors but that judgment was sought to be entered only against one – Mr. Sirley – and the fact that Mr. Sirley had taken out third party proceedings, should have exercised his discretion and not entered summary judgment against Mr. Sirley. Mr. Sirley's liability on his guarantee was several as well as joint and while the matters referred to by Mr. Salter were matters proper for consideration, as I have earlier said the mere fact that Mr. Sirley might have a claim by way of contribution or otherwise against any other person does not entitle him of itself to resist summary judgment if it is clear that he severally owes the plaintiffs the sum claimed. The judge was satisfied that he did and, as I have said, I agree with the judge.

For these reasons I consider that the decision of the judge was correct and that the appeal should be dismissed. As the other members of the court agree the appeal is dismissed with costs.

Law JA: The facts are fully set out in the judgment of Sir Charles Newbold, P., which I have had the advantage of reading in draft.

The main grounds of appeal were that the affidavit in support of the application for summary judgment was defective, and that triable issues were apparent from the pleadings. These triable issues, it was submitted by Mr. Salter for the appellants, were a denial that the money was ever lent, and the allegation in paragraph 4 of the defence that the respondents had agreed not to make any claims against Mr. Sirley so long as the Receiver's appointment continued in force. Indebtedness in respect of the loans was specifically acknowledged in the debentures issued as security for the loans, to which Mr. Sirley was a party. The alleged agreement is imprecisely pleaded; one cannot ascertain, from a perusal of paragraph 4, whether it was an oral or a written agreement, or when or where it was made, or between whom it was made. If there ever was such an agreement, I would have expected it to be particularised in an affidavit in opposition to the motion for summary judgment. As to Mr. Harkness' affidavit, I consider it to have been adequate, especially as its reliability was never challenged by counter-affidavit. In the words of Jenkins, L.J., in *Dummer v. Brown*, [1953] 1 All E.R. 1158:

> "That affidavit, as I have said, is open to criticism, and it may be true that the defendants could have destroyed its effect if they had condescended to answer it by an affidavit on their behalf containing even a slight indication of some real defence on the issue of liability. But that they never attempted to do. They have adopted a purely passive attitude. They put in the defence to which I have referred which did nothing except traverse in general terms substantially all the allegations in the statement of claim, and, having adopted that passive attitude, they say a case for summary judgment is not made out. Defendants who take that course do so at their peril and

> they have only themselves to thank if their reticence results in the court taking an adverse view of their side of the case."

I consider these words applicable to the case now before us. True, Mr. Sirley's defence went beyond a mere traverse, but in one respect it has been proved unreliable, and in another it alleges a subsequent agreement in terms so vague as not to merit consideration. I am also of opinion that this appeal fails, and I concur in the order proposed.

Duffus V-P: I agree with the judgment of my Lord President.

Appeal dismissed.

For the appellants:
C Salter, QC and *TR Johar*
B Sirley & Co, Nairobi

For the respondents:
RN Sampson
Archer & Wilcock, Nairobi

Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd

[1969] 1 EA 696 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	31 July 1969
Case Number:	9/1969 (119/69)
Before:	Sir Charles Newbold P, Duffus V-P and Law JA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya at Nairobi – Farrell, J

[1] Civil Practice and Procedure – Application – To dismiss suit for want of prosecution – To be made by motion.

[2] Civil Practice and Procedure – Inherent jurisdiction – Dismissal of suit for want of prosecution – Court has inherent power to order – Civil Procedure Act, s. 97 (*K.*).

[3] Civil Practice and Procedure – Preliminary point – Points of law only to be so raised.

[4] Civil Practice and Procedure – Want of prosecution – Dismissal of suit – Whether court has inherent power to order, apart from Civil Procedure (*Revised*) *Rules* 1948, *O.* 16, *rr.* 5 *and* 6, *and O.* 9, *r.* 16 – *Civil Procedure Act, s.* 97 (*K.*).

[5] Civil Practice and Procedure – Want of prosecution – Dismissal of suit – Whether it will be ordered when both parties had contributed to the delay.

Editor's Summary

At the opening of the hearing of a suit in the High Court the appellant, the defendant in that suit, asked the judge by way of preliminary objection to dismiss the suit for want of prosecution. The judge held that the case did not fall within any of the provisions of Orders 9 and 16, Civil Procedure (Revised) Rules 1948, and, following *Saldanha and Others v. Bhailal & Co. and Others* (1) that he had no inherent power to dismiss the suit. The order was appealed against, but in the meantime the suit had been heard and judgment given for the respondent.

Held –

(i) that court had inherent power to dismiss the suit notwithstanding that the case did not fall within any of the specific provisions of the Civil Procedure (Revised) Rules 1948, which do not purport to be exclusive (*Saldanha and Others v. Bhailal and Co. and Others* (1) overruled);

(ii) application to dismiss a suit for want of prosecution should be made by motion;

(iii) it could not be said that the judge would have dismissed the suit had he appreciated that he had power to do so, as both sides had contributed to the delay.

Observations on the prevalence of improperly raising points by way of preliminary objection.

Cases referred to in judgment:

(1) *Saldanha and Others v. Bhailal & Co. and Others*, [1968] E.A. 28.

(2) *Mulji v. Jadavji*, [1963] E.A. 217.

(3) *Rawal v. Mombasa Hardware Ltd.*, [1968] E.A. 392.

(4) *Fitzpatrick v. Batger*, [1967] 2 All E.R. 657.

(5) *Allen v. McAlpine*, [1968] 1 All E.R. 543.

(6) *Clough v. Clough*, [1968] 1 All E.R. 1179.

(7) *Marlton v. Lee-Levitan*, [1968] 2 All E.R. 874.

(8) *Gloria v. Sokoloff*, [1969] 1 All E.R. 204.

(9) *Hogan v. Adrianwalla*, [1965] E.A. 594.

(10) *Mandavia v. Rattan Singh*, [1965] E.A. 118.

(11) *Baker v. Rush*, [1964] E.A. 602.

July 31, 1969. The following considered judgments were read:

Judgment

Law JA: The suit out of which this appeal arises began by a plaint filed as long ago as August 22, 1961. The defence, which included a counterclaim, was filed on February 15, 1962, and the pleadings closed with a reply to the counter-claim filed on May 3, 1962. On June 8, 1962, the defendant obtained judgment on the counter-claim. Since then hearing dates for the trial of the plaintiff's claim have been fixed on six occasions, and taken out on five occasions, sometimes on the plaintiff's application and sometimes on that of the defendant. The final hearing date was fixed "by consent" on September 28, 1967, for February 26, 27, 28 and 29, 1968. The hearing in fact began on February 27, 1968. It was preceded by a so-called "preliminary objection" taken on behalf of the defendant, notice whereof had been served on the plaintiff five days previously, asking that the suit be dismissed for want of prosecution "pursuant to the inherent and other powers of the court". Mr. Khanna for the defendant was heard in support of this "preliminary objection"; Mr. Gautama for the plaintiff was not called upon to reply; and the trial judge ruled as follows:

"Preliminary objection overruled for reasons to be given later."

The plaintiff then called his evidence, after which the further hearing of the suit was adjourned and for reasons which are not apparent was not resumed until nearly a year later on January 29, 1969. At some time before this date, it is not clear when, the reasons for overruling the preliminary objection were made available to the parties although never read in open court. On January 29, 1969, Mr. Wilkinson, Q.C. who had been brought in by the defendant to lead Mr. Khanna, sought leave to adduce further argument in support of the preliminary objection. The learned judge refused to allow the matter to be reopened;

by consent of the parties the reasons for overruling the preliminary objection were then taken as having been read, whereupon Mr. Wilkinson applied for and obtained leave to appeal against that decision, but the judge refused to stay the further hearing of the suit pending a decision in the appeal. Mr. Wilkinson then obtained an adjournment on the ground that his principal witness was ill. The hearing was eventually resumed on April 14, 1969, when Mr. Gautama closed the plaintiff's case. Mr. Wilkinson then raised yet another preliminary objection to the further hearing of the suit, this time formally applying for the further hearing to be stayed pending the hearing of this appeal. This preliminary objection was overruled, whereupon Mr. Wilkinson announced that his appearance henceforth was under protest and that he would call no evidence. However he addressed the court at length, and judgment was reserved. On May 12, 1969, judgment was delivered in favour of the plaintiff. Against that judgment notice of appeal has been given and an appeal is pending to this court.

I revert to the appeal which is now before this court. The appellant is the defendant, the respondent is the plaintiff and the appeal is against the learned judge's decision overruling the "preliminary objection" asking for the suit to be dismissed for want of prosecution; the judge holding that the application did not fall within any of the specific provisions of Order 16, and that the court had no inherent jurisdiction to dismiss the suit for reasons other than those specified in the Civil Procedure Rules following in this respect the decision of Dalton, J., in *Saldanha and Others v. Bhailal & Co. and Others*, [1968] E.A. 28.

When this appeal opened before us, it was a matter of no surprise, having regard to the course taken in the past, that the proceedings began with yet another preliminary objection. This time it was made by Mr. Gautama for the respondent, and was to the effect that the appeal should be struck out as incompetent, because there was no appeal against Farrell, J.'S refusal to order a stay, and the suit had gone on for hearing, with the appellant participating, and judgment on the merits had been given. We dismissed this preliminary objection, reserving the reasons. Mr. Gautama's argument is, as I understand it, that even if this appeal succeeds, it will have no effect as the suit has in fact been disposed of. I do not accept this argument. If this appeal succeeds fully, and this court holds that Farrell, J., should have dismissed the suit for want of prosecution, the effect would be that all subsequent proceedings in the suit were a nullity and the final judgment and decree of no effect. Leave to appeal was obtained, and notice of intention to appeal given, several weeks before judgment on the merits was delivered. Although it seems arguable that this appeal is out of time, leave to appeal not having been obtained until nearly a year after delivery of the ruling appealed against, the point was not taken on behalf of the respondent and in the absence of argument I shall assume for the purposes of this judgment that the appeal is competent.

The first three grounds of appeal are directed against the learned judge's decision that he had no inherent jurisdiction to dismiss the suit for want of prosecution. Mr. Gautama concedes that these grounds must succeed, and has never contended otherwise. Order 16 provides for three ways whereby a suit can be dismissed for want of prosecution. By r. 2 if no application is made within twelve months to fix a hearing date after a suit has been generally adjourned, the court may give notice to the parties to show cause why the suit should not be dismissed. By r. 5, if the plaintiff does not set down the suit for hearing within a prescribed period, the defendant may either set it down or apply for it to be dismissed for want of prosecution. By r. 6 the court may of its own motion dismiss a suit in which no step has been taken for a period of three years. By O. 9, r. 16 the court may order the dismissal of a suit where the

summons has been returned unserved and the plaintiff fails within a year to apply for the issue of a fresh summons. Dalton, J., held in *Saldanha's* case (*supra*) that there was no inherent power in a court to dismiss a suit for want of prosecution in cases falling outside the specific provisions quoted above. Farrell, J., adopted this view. Dalton, J., in *Saldanha's* case purported to follow the decision of Windham, C.J., in *Mulji v. Jadavji*, [1963] E.A. 217, but all that case decided was that the court's inherent jurisdiction could not be invoked where an alternative remedy had been available. In the instant case, it is clear that none of the specific provisions for dismissing suits applied to the suit the subject of this appeal. That being so, I do not see how the court's inherent jurisdiction can be said to be fettered, as no alternative remedy existed. To take a hypothetical case, let us imagine that a plaintiff, who has taken no step in a suit for nearly three years, applies for a hearing date so as to prevent the court exercising its jurisdiction under O. 16, r. 6, repeating the process every three years, merely to keep the suit alive without intending to prosecute it. Surely a court could invoke its inherent jurisdiction and strike out the suit, under s. 97 of the Civil Procedure Code, to prevent abuse of the process of the court and to avoid injustice? As Sir Charles Newbold, P., said in *Rawal v. Mombasa Hardware Ltd*., [1968] E.A. 392:

> "Now I think that any rule which purports to take away the inherent jurisdiction of the courts should be looked at very carefully before it is construed in such a manner."

I am of the opinion that the provisions of the Civil Procedure Rules for the dismissal of suits for want of prosecution do not purport to be exclusive, and do not fetter the court's inherent jurisdiction to dismiss suits in circumstances not falling directly within those provisions, if it is necessary to do so to prevent injustice or abuse of the process of the court. With respect, I consider *Saldanha's* case (*supra*) to have been wrongly decided, in so far as it holds that the court's inherent jurisdiction cannot be invoked in cases falling outside those specifically provided for in the rules.

The position is that in my view the learned trial judge was wrong in holding that he had no inherent jurisdiction to strike out the suit, the subject of this appeal. What should now be done? Mr. Wilkinson submits that the matter should be sent back to the High Court for reconsideration of the "preliminary objection". In the alternative he concedes that this court has the same powers as the High Court to deal with the matter. I see no point in sending the matter back to the High Court, as Farrell, J., has left the country, and this court is in as good a position as another judge of the High Court to deal with it.

As to this, Mr. Wilkinson submits that the delay of six years between the close of pleadings and the hearing has been gravely prejudicial to the appellant. Although the appellant consented to the suit being removed from the hearing list in May, 1965, Mr. Wilkinson submits that the subsequent delay of some two and a half years on the part of the respondent is quite inexcusable, and must have resulted in the suit being dismissed had the judge not erroneously thought he had no power to do so. In support of this contention, Mr. Wilkinson cited as persuasive authority a number of recent English cases in which the courts in England have dismissed suits for want of prosecution in circumstances not dissimilar to those now under consideration. In particular Mr. Wilkinson relied on *Fitzpatrick v. Batger*, [1967] 2 All E.R. 657; *Allen v. McAlpine*, [1968] 1 All E.R. 543; *Clough v. Clough*, [1968] 1 All E.R. 1179; *Marlton v. Lee-Leviten*, [1968] 2 All E.R. 874; and *Gloria v. Sokoloff*, [1969] 1 All E.R. 204.

Mr. Gautama has cross-appealed in support of the learned judge's refusal to dismiss the suit on a number of grounds. Firstly, he submits that the appeal is futile as the case has in fact proceeded to judgment. I have already expressed

the view that this consideration is not effective to prevent this appeal from being heard and the further proceedings, if necessary, being held null and void. Secondly, he submits that the appellants were estopped from invoking the court's inherent jurisdiction as they had consented to the fixing of the hearing date. I see no merit in this ground; no consent to a hearing date can preclude the exercise of the court's discretion to dismiss the suit if the circumstances require such a course. Mr. Gautama's main ground of cross-appeal is that the procedure adopted by the appellant in invoking the High Court's jurisdiction to dismiss the suit was wrong and misconceived. The matter was raised in the guise of a preliminary objection, which it was not. It should have been raised in the form of an application by way of motion, as provided by Order 50. Had this been done, affidavits would have been filed, and the respondent could have given reasons for the delay in prosecuting the suit. As it is, Mr. Gautama was not called on to reply to the arguments in support of the so-called preliminary objection, and has had no opportunity to put forward reasons justifying the apparently inordinate delay in prosecuting the suit. Mr. Gautama also submits that if the appellant honestly believed it was prejudiced by the delay, it could long ago have made the necessary application by notice of motion.

I have considerable sympathy with Mr. Gautama's main ground. I agree that the application for the suit to be dismissed for want of prosecution should have taken the form of a motion, and not that of a "preliminary objection", which it was not. So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. However, as the learned judge in fact entertained the application, notwithstanding its defective form, and decided it in the respondent's favour, the cross-appeal on this point cannot have any practical effect. I would dismiss the cross-appeal, which incidentally we admitted out of time, and which was opposed by the inevitable preliminary objection that it was out of time, an objection which I consider to have been unnecessary as it was obvious on the face of it that the cross-appeal was out of time and could not be entertained unless this court granted the necessary extension of time.

In reply to the appeal itself Mr. Gautama urged that too much weight should not be attached to the English authorities relied on by Mr. Wilkinson, as conditions of practice in England and Kenya are not necessarily comparable. He also pointed out that in all the English cases a proper application for dismissal had been made by way of motion, and he repeated his contention that the adoption of the wrong procedure in this case had been to his disadvantage, as he had had no opportunity to place on record his reasons why the suit should not be struck out. I think there is considerable force in these arguments. I am not convinced that if the learned judge had appreciated that he had an inherent power to dismiss the suit, he would have done so; nor do I think that this court should feel compelled to take such action. Without wishing in any way to condone the inordinate delay which has undoubtedly occurred in this case it seems to me that both sides contributed to the delay in reaching a hearing, and that if the appellant genuinely believed itself to be prejudiced by the delay, it would have applied for dismissal at a much earlier stage.

For these reasons, I would dismiss the appeal with costs. I would also dismiss the cross-appeal, with costs. I would dismiss, with costs, the respondent's preliminary objection to the competency of this appeal. I would dismiss, with no order for costs, the appellant's preliminary objection to the cross-appeal being heard. I would certify for two advocates in respect of the appeal only.

Sir Charles Newbold P: The facts relating to this appeal are set

out in the judgment of Law, J.A., which I have had the advantage of reading in draft. I agree with it and, except in relation to three matters, I do not wish to add to what he has said.

The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.

The second matter relates to the undoubted delay in the hearing by the High Court of this case. It is the duty of a plaintiff to bring his suit to early trial, and he cannot absolve himself of this primary duty by saying that the defendant consented to the position. In this case there was undoubtedly excessive delay. It may well be that had all the facts been properly placed before the trial judge he, or on appeal this court, might have performed the draconian act of dismissing the suit for want of prosecution. But they were not; and in all the circumstances of this case I do not consider that this court should take this drastic step. I have no hesitation in coming to the conclusion that, having regard to the improper procedure adopted, the paucity of facts before the court and the inevitable dispute as to what are the facts, this case should not be remitted to the High Court for a new judge to exercise his discretion, a discretion which could only be exercised on the position as it was at the time the preliminary objection was taken, as the defendant could not be allowed two bites at the cherry. I wish, however, to make it clear that in future a plaintiff who, for whatever reason, delays for over six years before bringing his suit for trial can expect little sympathy.

The third matter is that it may well be that the appeal is not competent for two reasons. The first is that the decision which gives rise to the appeal was given on February 27, 1968 (see *Hogan v. Adrianwalla*, [1965] E.A. 594) but no leave to appeal against that decision was given within time; nor was any appeal against that decision lodged in time; nor does this appeal purport to be an appeal against that decision. Instead, the appeal purports to be against a ruling given on January 29, 1969, in respect of which a formal order was drawn up and in relation to which leave to appeal was granted, though on that day all that happened was that the reasons for the decision of February 27, 1968, were set out. The second is that the decision was not a judgment, nor did it result in a decree (see *Mandavia v. Rattan Singh*, [1965] E.A. 118) and it may well be that the points raised on this appeal should more properly have been raised on an appeal against the decree given on final judgment (see *Baker v. Rush*, [1964] E.A. 602 quoting with approval at p. 605 a passage from *Maharajah Makeshu Singh v. The Bengal Government*). These points, however, have not been argued and in these circumstances I do not think that I should base my decision on either of them. I do, however, refer to them in order to make it clear that our decision must not be taken as determining in any way either of these two points.

For these reasons I would dismiss this appeal and there will be an order in the terms proposed by Law, J.A.

Duffus V-P: I have read and agree with the judgments of Law, J.A and Newbold, P.

Appeal dismissed. Cross-appeal dismissed.

For the appellant:
PJ Wilkinson, QC and *DN Khanna*

Khanna & Co, Nairobi

For the respondent:
SC Gautama and *HM Parekh*
Satish Gautama, Nairob